No. 2415.

United States Circuit Co
of Appeals,

For the Ninth Circuit.

U. S. OIL & LAND COMPANY, a corporation,

Appellant,

vs.

TERESA BELL as Administratrix of the Estate of Thomas Bell, Deceased, with the Will annexed, et al.,

Appellees.

BRIEF FOR APPELLANT

RICHARDS & CARRIER,
JAMES L. CRITTENDEN,
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Filed ....

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By ..... *Deputy*

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BRIEF FOR APPELLANT

This suit is to quiet title to an undivided one-half (½) interest in and to 10,067.2 acres of land in Santa Barbara County California, and for other relief in Equity.

The District Court, Judge Rudkin presiding, after hearing and overruling all of several demurrers interposed by the defendants, after argument (Tr. p. 176),—after denying the motion of the defendants Hammon

and Van Deinse for judgment on the pleadings based on their joint and several pleas and answer fortifying said pleas and the Bill (Tr. p. 226),—and after denying a motion for hearing on the pleas and answer of defendants Teresa Bell et al. (Tr. p. 227), ordered that certain defendants be assigned to answer the Bill of Complaint and that the cause be continued until March 19th, 1913, "*to be heard separately on the question of certain judgments in the State courts,* providing said answers shall have been filed theretofore" (Tr. p. 227).

The Court held, on overruling said demurrers (Tr. p. 175), that the complainant had no adequate remedy at law in the Courts of the United States, also that the claim in suit was not stale, also that the complainant had not been guilty of laches, also that the suit was brought within the period limited by the statute of limitations of the State of California and that there was nothing on the face of the Bill to warrant the Court in curtailing the statutory period or in refusing to apply the analogy of the State statute, *and also that the Bill did state a case entitling the complainant to equitable relief,* stating "I am of opinion that the grounds of the demurrer are either not well taken or are not apparent on the face of the Bill" (Tr. p. 175).

The hearing separately on the sole question of certain judgments in the State courts mentioned in the Bill and the answers of certain defendants, in pursuance of the order of the Court above-mentioned, was had on March 20th, 1913 (Tr. pp. 289-291), and the Court thereafter on the 8th day of July, 1913, made and filed its opinion on said hearing (Tr. pp. 291-296), and thereafter on July 17th, 1913, made and filed an order and decree, which had been prepared by solicitors for defendants without being seen by any of the solicitors or counsel for complainant, wherein and whereby, after certain recitals, it was "ordered, adjudged and decreed that the Bill of Complaint herein be and the same is hereby dismissed, and that the above-named defendants do have and recover from the complainant their costs herein taxed at $.....".

The said decree was thereafter entered and recorded July 21st, 1913 (Tr. pp. 296-297), and was thereafter on December 8th 1913, modified by an order and decree of the court (Tr. p. 323) by inserting in the recitals thereof the words and sentences "but the complainant did not stipulate or admit that such judgments or decrees were valid or binding or that the said several courts had jurisdiction to render or enter the same." This correction of the decree was made on hearing of a motion made by complainant to correct said decree (Tr. pp. 297-300), but the Court failed to make the full correction applied for by the motion and to which complainant claimed and still claims it was entitled.

The Court in and by its opinion and decision (Tr. pp. 291-296) *held that the Bill was "without equity and should be dismissed,"* and directed a decree to be entered accordingly. This appeal is from said decree of dismissal filed on July 21st. 1913. (Tr. p. 297.)

The appeal was allowed upon petition of complainant, and bond in sum of $500 on appeal fixed, executed, approved and filed all on the fourteenth day of January, 1914 (Tr. pp. 241-345). Praecipe to the Clerk of the District Court for a transcript on appeal was served upon all of the solicitors for the several appellees on the fourteenth and fifteenth days of January, 1914 (Tr. pp. 345-347). Three copies of transcript were served on the 4th and 5th of August 1914 upon each of the several solicitors for appellees and receipt thereof admitted (see admissions on transcript).

The appellant contends and insists on this appeal that the Court erred in its decision and in making said decree, and that it clearly appears in and by the Bill and the facts admitted by the pleadings that the appellant was and is entitled to equitable relief—entitled to have its title quieted to an undivided one-half of the 10,067.2 acres of land described in the Bill and to the other relief prayed for in its Bill. The Judge seems to have utterly ignored many of the material facts alleged in the Bill and admitted or not denied by any of

the answers, also the well-settled principles and rules of the law applicable to such admitted or undenied facts and allegations; he seems never to have fully understood or grasped either the issues of fact or the issues of law as made and presented by the Bill and answers or the authorities submitted to him on the hearing. This will more fully appear by the statement of the case and the points and authorities hereinafter presented.

STATEMENT OF THE CASE.

The land involved in this suit is 10,067.2 acres situate in Santa Barbara County California, and fully described in the Bill, appellant claiming and asserting title in fee and ownership of an undivided one-half thereof and alleging fully and particularly the execution and recording of the several deeds and conveyances for valuable considerations by and under which it acquired title in fee thereto (Tr. pp. 6, 85-87). The deed and conveyance of the undivided one-half of said tract was made and executed to appellant by James L. Crittenden and Nina D. Crittenden, his wife, on the eighteenth day of September, 1902, and recorded on the twenty-sixth day of September, 1902 (Tr. p. 67), and thereafter another deed and conveyance was executed to appellant on the third day of March, 1911, by the San Luis Land and Improvement Company, for a valuable consideration, and thereafter recorded on March 5th, 1911 (Tr. pp. 85-86). The chain of title from John S. Bell to said James L. Crittenden by sales, deeds and conveyances for valuable considerations is fully and clearly alleged in the Bill (Tr. pp. 85-87).

The only question before the Court as limited by its order (Tr. p. 227) being "certain judgments in the State courts," the real merits and equities of the Bill were not heard or tried. and could not be and were not properly or fairly decided, yet the Court held and decreed that the Bill was without merit and dismissed the suit. It becomes necessary, therefore, to present

fully the case upon the merits as presented by the Bill, most of its averments being admitted or not denied by the answers of all of the defendants. The sufficiency of the Bill could only be considered or decided by giving the fullest weight and effect to each, every and all of its averments, allegations and statements and by assuming them to be absolutely true. Conscience and fairness demanded this and Courts of Equity have always so acted.

The answer of defendants Hammon and Van Deinse, with great fairness, admits directly, or states that they are without knowledge as to the most of the facts alleged in the Bill, and will be found upon examination to have denied only the charges of fraud, fraudulent intents, wrongful and unlawful conduct, the sufficiency of the deeds to transfer title to appellant and its grantors, and that the appellant is the owner in fee or otherwise of an undivided one-half or any part of said 10,067.2 acres tract of land; they admit and allege by their answer that they claim title to 2,100 acres of said tract, under deeds executed in 1911 and 1912 describing the portion claimed by them and that they had notice of all matters of record "and in said divers court proceedings" (Tr. pp. 258-261, 288); they deny the effect and conclusiveness of the decrees and findings in the suits of *Bell* v. *Staacke* and *Bell* v. *The San Francisco Savings Union,* as alleged in the Bill. We claim and contend that appellant was entitled to judgment upon the Bill and the answer of Harmon and Van Deinse and would have obtained a decree upon a trial on the merits against then and all of the defendants.

Some of the defendants in their answers set up a special defense of a pretended second judgment in *Bell* v. *Staacke,* and a pretended or purported sale thereunder which were void for want of jurisdiction.

The Bill shows and states: The diverse citizenship of the complainant and the defendants; the incorporation of the complainant under the laws of Arizona and the incorporation of the several corpora-

tion defendants under the laws of the State of California; the death of Thomas Bell in October, 1892, the probate of his will and proceedings therein resulting finally in the appointment and qualification of Teresa Bell as administratrix of the estate, with the will annexed; that the complainant is the owner in fee simple absolute of an undivided one-half of all that certain tract, piece and parcel of land situate, lying and being in the County of Santa Barbara, State of California, consisting of 10,067.2 acres (describing the same at length); that the defendants and each of them claim and assert an estate or interest adverse to complainant in said tract of land, that such claims are wrongful and unlawful and without any right whatever, and that the defendants have no right, title, estate or interest whatever in or to the undivided one-half thereof of which complainant is owner.

In 1887, August 23rd, John S. Bell and his uncle, Thomas Bell, joined in a sale and conveyance to Dwight W. Grover of two tracts of land in Sanat Barbara County, one of 10,067.2 acres owned by said John S. Bell and the other of 4000 acres owned by said Thomas Bell, for $350,000, $70,000 cash, and the balance in notes of Grover secured by two mortgages, one for $216,000 on said 10,067.2 acres, and the other for $54,000 secured by a mortgage on the 4,000 acre tract. All the notes and mortgages were made and executed to Thomas Bell. The purchase price of the 10,067.2 acres being $270,000 and that of the 4,000 acres $80,000.

On August 27th, 1887, said Thomas and John S. Bell made and executed a written agreement in regard to said sale (Tr. pp. 233-234), stating that said sale of said two tracts of land was made for $350,000,—that Thomas Bell owned the said 4,000 acres and John S. Bell the said 10,067.2 acres,—that the former was sold for $80,000 and the latter (10.067.2 acres) for $270,000, that the cash payment of $70,000 was received by said Thomas Bell, except $600 paid to John S. Bell, that on an accounting had between said Thomas Bell and

John S. Bell said John S. Bell was indebted to said Thomas Bell $25,529.05, that it was agreed between said Thomas Bell and John S. Bell that said Thomas Bell should hold the said notes and mortgage on said John S. Bell's land as security until he was repaid all present and any future loans and advances with interest and then "on demand assign the same to said John S. Bell."

On August 25th 1887 said Grover sold and conveyed to Samuel Rosener an undivided three-fifths of said two tracts.

On March 7 1889 Grover and Rosener, being unable to pay the interest or balance of the purchase price, conveyed to George Staacke all of said lands except such as had been sold by them and also transferred and delivered to Thomas Bell all notes and mortgages taken by them for deferred payments on portions of said tracts that had been sold by them and did so upon a release of all claims against them and the surrender and transfer to them of all of said notes and said two mortgages under and in pursuance of an agreement between them and said John S. Bell and Thomas Bell. George Staacke paid nothing to anyone for said lands or for or on account of said conveyance by Grover and Rosener of the same to him.

The agreement between said John S. Bell and Thomas Bell and said Grover and Rosener under which said conveyance was made to Staacke was found and adjudged by Judge Day in the decree in *Bell* v. *Staacke et al.,* which we say was final, and was that it should be so conveyed by Staacke to Grover and Rosener for the sole purpose of conveying and to convey to John S. Bell said 10,067.2 acres and to said Thomas Bell said 4,000 acres (Tr. pp. 14-15), but Taggart, Judge of the same court, in the later suit of *Kate M. Bell et al.* v. *San Francisco Savings Union et al.,* held (Tr. p. 236) that said agreement as to said conveyance to Staacke was that the 10,067.2 acres should be held by him as security for the payment of any money due from John S. Bell

to Thomas Bell and after the payment of such indebtedness "*to convey to the said John S. Bell the said tract of land* or all that remained thereof after the payment of all sums then due to said Thomas Bell by said John S. Bell and all advances and loans thereafter made by said Thomas Bell to said John S. Bell."

In 1893 a suit was brought by John S. Bell in the Superior Court of Santa Barbara county against George Staacke individually, the executors of the estate of Thomas Bell (who had died in 1889) and Louis Jones, then in possession of said 10,067.2 acres, to quiet title to the same, to compel Staacke to execute a good and sufficient conveyance to John S. Bell and for other relief. Staacke had claimed and asserted that he held the title to said tract to secure payment of money alleged to be due Thomas Bell from John S. Bell at the time of the death of Thomas Bell.

On March 6th 1901 the Judge of said Superior Court made and filed certain Findings of Fact and Conclusions of Law in said suit of *Bell* v. *Staacke* in favor of Kate M. Bell and James L. Crittenden, the successors in interest of John S. Bell, which are set forth at length on pages 22-34 of the Transcript.

On June 7th 1901 Judge Day of said Superior Court made and filed *additional* Findings of Fact and Conclusions of Law, in said action of *Bell* v. *Staacke et al.*

On June 29th 1901 a decree in favor of said Kate M. Bell and James L. Crittenden was made and entered in and by said Court, a copy of which is set forth at length in the transcript pages 12-17. *No notice of intention to move for a new trial was ever made, given, served or filed on or after June 7th 1901* (alleged in the Bill, Tr. p. 18 and admitted by Hammon and Van Deinse, Tr. pp. 263-264, and not denied by any of the defendants).

The only appeals taken by any defendants from the said judgment of June 29th 1901 were dismissed for want of jurisdiction (Tr. p. 18) (not denied by any of the defendants except Hammon and Van Deinse, who

merely deny that it was dismissed "for want of jurisdiction").

The only parties to said suit of *Bell* v. *Staacke* No. 2826 in said Superior Court were John S. Bell, plaintiff, his successors in interest, Kate M. Bell and James L. Crittenden, and defendants George Staacke, Louis Jones, George Staacke and J. W. C. Maxwell as executors of the estate of Thomas Bell, deceased, and Teresa Bell as special administratrix and also as administratrix with the will annexed of said estate of Thomas Bell.

In 1898 Kate M. Bell and James L. Crittenden as plaintiffs commenced suit (No. 4424) in said Superior Court of Santa Barbara county to quiet title to said 10,067.2 acres and for other relief against the San Francisco Savings Union, Edward B. Pond, Thaddeus B. Kent, George Staacke, Teresa Bell, Thomas Frederick Bell, Marie Teresa Bell, Robina Bell, Muriel Bell, Reginald Bell and Eustice Bell, Teresa Bell as guardian of the persons and estates of said Robina Bell, Muriel Bell, Reginald Bell and Eustace Bell, and Teresa Bell as admisistratrix of the estate of Thomas Bell, deceased, with the will annexed, John Doe, Richard Roe, Jane Doe, Mary Roe, and Mercantile Trust Company of San Francisco, defendants (Tr. p. 39). Thereafter defendants The San Francisco Savings Union, The Mercantile Trust Company and Teresa Bell as such administratrix by cross-complaint made the U. S. Oil & Land Company a defendant to their cross-complaints in said suit, the said U. S. Oil & Land Company having become the purchaser and owner of an undivided one-half of said 10,067.2 acre tract by sale and deed to it made and executed by said James L. Crittenden and his wife on the 18th day of September 1902, which said deed was duly recorded on the 26th day of September 1902 (Tr. p. 37). The U. S. Oil & Land Company was never at any time made a party to said suit of *Bell* v. *Staacke*.

On the 14th day of March 1905 Findings were filed by the court in said suit of *Kate M. Bell and James L.*

Crittenden v. *San Francisco Savings Union et al.,* No. 4424, a copy of which is set forth in the Bill (Tr. pp. 73-81).

None of the defendants in said suit of *Kate M. Bell and James L. Crittenden* v. *San Francisco Savings Union et al.,* No., 4424, pleaded or set up by abatement or in any manner whatever any Findings, Judgment or Decree or any proceeding or proceedings had or made or purported to have been had or made in said suit of *Bell* v. *Staacke et al.,* and the only reference made in the findings or judgment in said suit of *Kate M. Bell and James L. Crittenden* v. *San Franicsco Savings Union et al.,* No. 4424, is a statement that said suit of *Bell* v. *Staacke et al., "is still pending* in this Court . . . and the *relations between said John S. Bell* and his grantees of said first above described (10,067.2 acres) of said two several tracts of land on the one hand and said defendants George Staacke and Teresa Bell as administratrix of the estate of Thomas Bell, deceased, with the will annexed on the other hand in respect to said indebtedness of John S. Bell to said Thomas Bell and in respect to said first above described of said two several tracts of land and all or any parts thereof *are involved* in said action and constitute the subject-matter thereof and are in course of judicial determination and settlement therein." The court having made merely such reference to the pendency of said action of *Bell* v. *Staacke,* proceeded in its "Conclusions of Law" to declare (Tr. p. 72) that the court was vested by said action of *Kate M. Bell and James L. Crittenden* v. *San Francisco Savings Union et al.,* No. 4424, with jurisdiction with respect to said two several tracts of land for the purposes of determining the issues raised therein by the complaint of said plaintiff and the answers thereto (which iuclude every issue in *Bell* v. *Staacke*), and for the purpose of doing complete justice *and determining completely all controversies with respect to said two tracts of land,* and, further, that upon confirmation of any sale made pursuant to the decree the title of any purchaser *"be quieted in this action*

against any and all claims of the parties hereto or of any of them'' (Tr. p. 73), also that the defendant Teresa Bell as administratrix of the estate of Thomas Bell, deceased, with the will annexed was entitled to no other judgment than that the 10,067.2 acre tract be sold *any of them''* (Tr. p. 73), also that the defendant

The court found, in and by the said Findings of Fact (Tr. pp. 21-33), that John S. Bell was in possession of said tract of 10,067.2 acres of land from October, 1874, to August 23rd, 1887, as his property when he sold and conveyed the same to Dwight W. Grover, his uncle, Thomas Bell, selling to Grover at the same time the 4,000 acres adjoining, the purchase price of both tracts being $350,000—$70,000 cash and the balance secured by separate mortgages upon said tracts, $216,000 on said 10,067.2 acres and $54,000 on said 4,000 acre tract; that the notes and mortgages were made and executed to Thomas Bell for the purpose of rendering the execution of releases and partial releases more convenient and easy, to facilitate sales and in furtherance of an agreement between Thomas Bell and John S. Bell which provided that Thomas Bell should receive the money due from Grover to John S. Bell and apply the same in payment of an indebtedness of about $25,000 and any advances thereafter made by Thomas Bell to John S. Bell; that the interest was not paid on said indebtedness by Grover and his grantee, Rosener, and said Grover and Rosener then agreed with said John S. Bell and Thomas Bell to convey back to John S. Bell said tract of 10,067.2 acres of land and to Thomas Bell said 4,000 acre tract, except such parts thereof as had been sold and conveyed by Grover and Rosener to other persons, and that the promissory notes secured by said mortgages should be transferred and surrendered to said Grover and Rosener; that it was agreed and understood by and between Thomas Bell and John S. Bell that said lands should be reconveyed to them respectively according to their original titles, except in so far as there had been sales made from the tract formerly belonging to John S. Bell, and that the conveyance back was to be made

through George Staacke; that on the 7th day of March 1889, under and in pursuance of said agreements the notes secured by said mortgages were transferred and surrendered to said Rosener for himself and Grover, and said Grover and Rosener made and executed a deed of conveyance to said George Staacke purporting to convey to him said tracts of land, excepting certain parts described in the Findings—all in pursuance of said agreements to convey back to John S. Bell and Thomas Bell, which deed was duly recorded on the 3rd day of June 1889, in the records of Santa Barbara county and thereafter on June 6, 1889 was delivered to said George Staacke; that said George Staacke paid no consideration for the same and never took possession of said real property or any part thereof or assumed any control over the same under or by virtue of said conveyance or otherwise; that on March 10th, 1889, John S. Bell entered upon and took possession of said tract of 10,067.2 acres as owner thereof and was in the open, notorious and adverse to all the world possession thereof, paying all taxes levied thereon; that said Staacke had notice and well knew and understood, before the execution and delivery to him of said deed of March 7th, 1889, and before the recording thereof, that John S. Bell had sold and deeded said land to Grover and that there was due to him from Grover more than $216,000 on account of the purchase price thereof, and other facts stated in said Findings; that said Staacke was never in possesion of said tract of 10,067.2 acres or any part thereof in any manner whatsoever or as trustee or otherwise; that it was never at any time agreed between John S. Bell and Thomas Bell and George Staacke, or by either or any of them, that said Staacke should hold said 10,067.2 acres or any part thereof as security for the payment by John S. Bell to Thomas Bell of any money or indebtedness whatsoever or that said Staacke should go into possession thereof or should collect or receive any rents, issues or profits thereof; that said Staacke did not become and had not been and was not vested with the legal title of said tract of 10,067.2 acres or any

part thereof in trust for Thomas Bell or to secure the payment of any sum or sums of money advanced by Thomas Bell to John S. Bell and had no beneficial or other interest in the same, and held the naked legal title so conveyed to him by Grover and Rosener "in trust for the purpose of conveying and to convey and deed to the plaintiff" (John S. Bell) the same; that said Staacke borrowed on February 3rd, 1892, from the San Francisco Savings Union $60,000 for the use of Thomas Bell upon his (said Staacke's) promissory note therefor, endorsed and guaranteed by Thomas Bell, and to secure the payment thereof executed and delivered a trust deed upon both of said tracts of land; that said $60,000 was credited by Thomas Bell to John S. Bell; that said San Francisco Savings Union, after the death of Thomas Bell, presented to the executors of his estate a claim against the estate of Thomas Bell upon said note of $60,000, and that said claim was duly approved and allowed by the executors of said estate and by the Superior Court having jurisdiction of said estate and was still held by San Francisco Savings Union against said estate of Thomas Bell and was a valid claim; that no authority was given to or vested in said George Staacke by or under the terms of the trust upon which said lands were conveyed to him or otherwise to borrow any money upon said land or any part thereof or to mortgage or deed or convey in trust the same as security for any moneys borrowed by him thereon, and that said Staacke had no power or authority as such trustee to borrow said $60,000 or any part or portion thereof or to make or execute the trust deed to Thaddeus B. Kent and Henry C. Cambell to secure payment thereof or to convey said lands or any part thereof, andthat the borrowing of said $60,000 and the execution of said trust deed were wrongful and in violation of the trust upon which said lands were held by Staacke; that all of said $60,000 so borrowed by said Staacke was received by Thomas Bell for his individual use and benefit, except as John S. Bell may have received the benefit of credit on his indebtedness to Thomas Bell; that

said Staacke wrongfully and in violation of said trust refused to convey to plaintiff (John S. Bell) that portion of said tract of 10,067.2 acres of land conveyed to him (Staacke) by said deed of March 7th, 1889; that each and all of the sums of money advanced by Thomas Bell to John S. Bell from and after the 6th day of March, 1889, was and were made to John S. Bell individually and personally from motives of love and affection and not upon or by reason of any claim or assertion on the part of said Thomas Bell that said agreement of August 27th, 1887, between him and John S. Bell remained or continued in force or upon or by reason of any claim or assertion of any lien upon said 10,067.2 acre tract or upon or by reason of any claim or assertion by said Thomas Bell or by said George Staacke that said deed of March 7th, 1889, was or had been made to said George Staacke as security for the payment of any money due to Thomas Bell or for any advances of money made by Thomas Bell to John S. Bell; that said John S. Bell was indebted in the sum of $52,120.15 to Thomas Bell on the 16th of October, 1892, when Thomas Bell died, but that said indebtedness, and the claim of Thomas Bell therefor, was not nor was any part of it a lien upon the land or any part of the land conveyed by said deed of March 7th, 1889, to George Staacke.

The Court found as Conclusions of Law (Tr. pp. 33 34)

"1. That the plaintiff is entitled to a good and sufficient deed of conveyance from said George Staacke of all that part or portion of said 10,067 2-10 acres of land conveyed by Dwight W. Grover and Samuel Rosener to said George Staacke by said deed of March 7, 1889, and to decree that said George Staacke make execute and deliver to the plaintiff a good and sufficient deed and conveyance of all that part or portion of said 10,067 2-10 acres of land conveyed by Dwight W. Grover and Samuel Rosener to said George Staacke by said deed of March 7, 1889.

"2. That the plaintiff is entitled to an injunction enjoining and restraining said George Staacke and said Teresa Bell as special administratrix of the estate of Thomas Bell, deceased, and any and all persons claiming by or through or under them or either of them, from asserting or claiming any right, title or interest to any or all of that part or portion of said 10,067 2-10 acres of land conveyed by Dwight W. Grover and Samuel Rosener to said George Staacke by said deed of March 7, 1889, being the land described in the cross-complaint of defendants and in paragraph II of said amended and supplemental complaint.

"3. That the plaintiff is entitled to his costs in this action incurred and to a judgment therefor.

"4. That said defendant Teresa Bell as special administratrix of the estate of Thomas Bell, deceased, is entitled to judgment herein against said plaintiff John S. Bell for the sum of fifty-two thousand one hundred and twenty and 15-100 dollars, with interest thereon from the 16th day of October, 1892."

The court thereafter on the seventh day of June, 1901, made and filed additional Findings of Fact upon material issues raised by the pleadings, not covered by its former Findings, and Conclusions of Law (Tr. pp. 34-35), stating as a reason therefor that,

"It appearing to the Court that in the findings of fact in the above entitled action, heretofore made and filed on March 6th 1901, there is an omission to dispose of the issue of fact raised by the plaintiffs amendment to his answer to the defendants' amended cross-complaint, which amendment to plaintiff's said answer was filed June 17th, 1897, and it appearing further to the Court that said omission was through inadvertence;

Now therefore, in as much as the judgment has not yet been made or entered on said findings, the Court of its own motion, to supply said omission in said findings and upon the evidence submitted at the trial of said action, makes the following additional findings of fact and conclusions of law."

The Court in and by said judgment and decree (Tr. pp. 12-17) in *Bell* v. *Staacke,* made on June 29th, 1901, adjudged and decreed, among other things, that John S. Bell had deeded and conveyed, after the commencement of said action of *Bell* v. *Staacke,* said tract of 10,067.2 acres and all his right, title and interest therein to Catherine M. Bell and James L. Crittenden, and that said Catherine M. Bell and James L. Crittenden had succeeded to all the right, title and interest of John S. Bell in and to said tract of land and to all the rights of action of said John S. Bell, each to an undivided one-half thereof, and that the Court had theretofore ordered said action to be continued in the name of the original plaintiff, John S. Bell; that said successors to John S. Bell were entitled to the relief prayed for in the amended and supplemental complaint including,

First: That George Staacke, one of the defendants in this action, make, sign and acknowledge, execute and deliver a good and sufficient deed and conveyance to Katherine M. Bell and James L. Crittenden each of an undivided one-half of the following described lands, to-wit All that real property situate in the County of Santa Barbara, State of California, forming a part of the rancho known as "Rancho de Los Alamos." to-wit:

(Same description of 10,067.2 acres tract of land as on pages 6, 7. 8, and 9. of Tr.)

"Fifthly: That the defendants George Staacke, and Teresa Bell as special administratrix of the estate of Thomas Bell, deceased, and each of said defendants and the attorney and attorneys, agent and agents of each of said defendants and any and all persons acting for or claiming any right, title or interest of, in or to the following described lands be and are enjoined and restrained, and are hereby commanded to refrain and desist from asserting, maintaining or pretending to have any right, title, interest, lien, claim or demand in, to, upon or against all or any part or portion of the following described lands and real property, to-wit: All that real property situate in the County of Santa Barbara,

State of California, forming a part of the rancho known as "Rancho de Los Alamos," to-wit:"

(Same description of 10.062.2 acres tract of land as on pages 6, 7, 8 and 9 of Tr.,)

It adjudged and decreed in and by said judgment of June 29th, 1901, in favor of said successors and grantees of John S. Bell the other issues and matters included in and covered by said Findings of Fact and Conclusions of Law (Tr. pp. 14-17).

The bill further avers and alleges (Tr. p. 11):

"That on the *29th day of June, 1901,* a judgment and decree was duly made and rendered in and by the said Superior Court of Santa Barbara County and Hon. W. S. Day, Judge thereof, and was duly filed therein on said 29th. day of June, 1901, in said Superior Court by C. A. Hunt, County Clerk of said County of Santa Barbara and Clerk of said Superior Court, in an action then pending in said Superior Court entitled "John S. Bell, plaintiff vs. George Staacke and John W. C. Maxwell, as executors of the will of Thomas Bell, deceased, and Louis Jones, defendants," and in which action Teresa Bell, as special administratrix of the estate of Thomas Bell, deceased, at her request as such administratrix had been substituted by order of said Superior Court made in said action as defendant in place of defendants George Staake and John W. C. Maxwell, as executors of the will of Thomas Bell, deceased; that the said judgment and decree so rendered, made and filed on the 29th day of June, 1901, was thereafter duly *entered on the 9th day of July, 1901,* by the Clerk of said Superior Court in the records and Judgment Book of said Superior Court; that said judgment and decree was entitled in said action and cause and was in the words and figures following, to-wit:" (Setting forth at length a copy thereof on pp. 12-17).

(Admitted by answers pp. 262-3; 167-8; 106; 137. A frivolous denial that said judgment "was in the words

and figures alleged and set forth in said bill of complaint" made by *some* of the defendants on pages 106 and 137 is coupled with a direct *admission* "that *a judgment of like purport* was made by the said Superior Court and filed in said action on the 29th day of June 1901).

That the appeal taken on the 8th day of July, 1901, by the defendants in said action from said judgment was dismissed by the Supreme Court for want of jurisdiction. (Tr. pp. 17-18). (Admitted, Tr. pp. 106-7; 137-8; 167-8; 263. Hammon and Van Deinse deny merely "that the said appeal was so dismissed for want of jurisdiction").

"That the said judgment and decree thereby by such dismissal of the appeal became and was affirmed; that said judgment and decree ever since has been and remained and still is in full force; and that said judgment and decree was and is a final adjudication of the rights and interests of the parties to said action in which it was rendered and entered." (Tr. p. 18) (Denied by defendants).

"That the said Superior Court and the Judge thereof, in said action in which said judgment and decree was rendered, rendered and filed Findings of Fact and Conclusions of Law therein on the 6th day of March, 1901, *and thereafter rendered and filed additional Findings of Fact and Conclusions of Law on the 7th day of June, 1901, on material issues raised by the pleadings in said action;* that no motion for a new trial in said action of *John S. Bell* v. *George Staacke et al,* and no notice of intention to move for a new trial therein was made, given, served or filed on or after the 7th day of June, 1901, and the time to serve and file any notice of intention to move for a new trial therein expired on or about the 17th day of June, 1901."

(Tr. p. 18) (*Admitted unqualifiedly* by Hammon and Van Deinse, Tr. p. 263-4; not denied by Associated Oil Co., p. 167-8; the other defendants merely evade deny-

ing the allegation by the evasive denial "that the time to serve and file any notice of intention to move for a new trial in the said action entitled "*John S. Bell* v. *George Staacke et al*" after the decision therein made on the 6th day of March 1901 expired on or about the 17th day of June 1901." Tr. pp. 111; 142).

"*That each and all of the defendants and attorneys for the defendants in said action in which said judgment and decree of June 29th, 1901, was rendered and filed had notice and well knew on and before the ninth day of July, 1901, that said findings and said additional findings and conclusions of law and said judgment and decree had been rendered and filed at the time and as hereinabove in this paragraph and in this bill alleged and shown.*" (Tr. p. 20) (*Not* denied).

"That it was declared and provided in and by the laws of the State of California and by the Act of the Legislature of the State of California entitled "An Act to establish a Code of Civil Procedure," approved March 11th, 1872, as amended in and by that certain Act of the Legislature of the State of California entitled "An Act to amend the Code of Civil Procedure" approved March 24th, 1874, and in and by section 659 of said Code of Civil Procedure as amended by said Act of March 24th, 1874, that "The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court, or referee, if the action were tried without a jury, file with the Clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court, or a bill of exceptions, or a statement of the case . . .; that it was declared and provided in and by section 254 of said Act of March 24th, 1874, that said Act should take effect on the first day of July, 1874; that said section 659 of the Code of Civil Procedure of California, as amended by said Act of March 24th, 1874, was and continued to be in full

force from the first day of July, 1874, until May 20th, 1907, when it was amended by an Act of said Legislature of the State of California entitled "An Act to amend sections six hundred and fifty-six, six hundred and fifty-nine, six hundred and sixty, and to re-number and amend section six hundred and sixty-three and a half of the Code of Civil Procedure, all relating to new trials," approved on March 20th, 1907, by the Governor of the State of California; that said section 659 was amended by said Act approved March 20th, 1907, so as to read as follows, "The party intending to move for a new trial must, within ten days after receiving notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the minutes of the Court, or a bill of exceptions, or statement of the case . . . ;" that said section 659 of said Code of Civil Procedure of California and the provisions thereof as amended by said Act of March 20th, 1907, has been in full force since May 20th, 1907, and is now in full force; that said action in which said judgment and decree dated the 29th day of June, 1901, was rendered and filed was tried without a jury by said Superior Court." (Tr. pp. 19-20 (Not denied).)

"That it is provided and declared in and by section 955 of said Code of Civil Procedure that "The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal," and said section 955 and the provisions thereof have been in full force and effect since said Act of March 11th, 1872, was enacted and went into effect, and is and now are in full force and effect; that the Supreme Court of California did not in or by its order, judgment, and decree dismissing the appeal from said judgment and decree of said Superior Court dated and filed in said Superior Court on the 29th day of June, 1901, dismissed

said appeal without prejudice to another appeal or to any other appeal and did not either expressly or otherwise provide or declare that the dismissal of said appeal was made expressly or otherwise without prejudice to another appeal or to any other appeal; that said appeal taken by the defendants from said judgment and decree dated June 29th, 1901, was dismissed by an order and judgment of the Supreme Court of the State of California duly made and rendered in bank on the 16th day of September, 1902, and that said order and judgment dismissing said appeal from said judgment has never been modified, vacated or set aside." (Tr. pp. 20-21) (*Not* denied; admitted by Hammon and Van Deinse, Tr. pp. 265-266).

"That the said findings of fact and conclusions of law made, rendered and filed in and by said Superior Court as aforesaid on the 6th day of March, 1901, and on the 7th day of June, 1901, were and constituted the decision and the only decision of said Superior Court in said action entitled "John S. Bell, plaintiff v. George Staacke and John W. C. Maxwell, as executors of the will of Thomas Bell, deceased, and Louis Jones, defendants," upon which said judgment and decree of said Superior Court was made and filed on the 29th day of June, 1901, as aforesaid; that said findings of fact and conclusions of law and additional findings of fact and conclusions of law are in the words and figures following, to wit:" (Setting forth at length a copy thereof.(See pages 21 to 35). (Admitted by Hammon and Van Deinse, Tr. pp. 265-6; *not* denied by any of the defendants).

"That the findings of fact and conclusions of law and the decision of said Superior Court in said action of *John S. Bell* v. *George Staacke et al,* on the 9th day of sive and binding upon all the parties to said action, and July, 1901, became and ever since have been final, conclutheir successors in interest, and upon each and all of the heirs of said Thomas Bell, deceased, and the jurisdiction and power of said Superior Court to hear or grant

any motion for a new trial in said action was then terminated forever and ceased to exist, and the said Superior Court and any and all appellate courts of the State of California, and the Supreme Court of the State of California lost and ceased to have any jurisdiction whatsoever to entertain, hear, pass upon or review any notice of intention to move for a new trial or any motion for a new trial in said action or any order made on any such notice or motion, or to modify, alter or change in any way or manner or respect said judgment of said Superior Court. (Tr. pp. 18-19). (Denied).

SPECIFICATIONS OF THE ERRORS RELIED UPON BY APPELLANT FOR REVERSAL OF DECREE DISMISSING BILL.

The appellant hereby refers to its assignment of errors in the Transcript on pages 324-341 and makes each and all of the assignments of errors therein contained and set forth including the reasons therein stated a part of this brief as fully as if set forth and printed at length herein as a part of these specifications and hereby states that appellant makes each of said assignments of error a specification of error on this appeal and relies upon each of the same with the reasons therewith stated as a ground for the reversal of the order and judgment dismissing its Bill of Complaint in this suit.

The appellant further shows and states that it asserts and urges and intends to urge on this appeal and the hearing thereof each and every one of said errors and assignments of error with the reasons and grounds therewith set forth in said assignment of errors.

Appellant further states that it specifies, asserts and intends to urge on this appeal that said decree dismissing the Bill of Complaint was erroneous in each of the following particulars and respects, to-wit:

(1.) In dismissing said Bill of Complaint whereas said Bill is meritorious and entitled plaintiff to equitable relief.

(2.) In sustaining the special defense set up in the answers of certain defendants upon which said decree was based and designated in the decree as "the defense heretofore presentable by plea in bar," whereas said defense was without merit and should have been overruled.

(3.) In holding and deciding in and by the opinion and decision on the hearing of said special defense directing said decree to be entered (Tr. p. 294) that "the complainant bases its claim of right or title on the deed from John S. Bell to Crittenden, on the first or original decree in *Bell* v. *Staacke,* supra, and on the deed deposited by Staacke with the Clerk of the court in order to effect a stay of proceedings pending the appeal" (quoted from decision), whereas it appears in and by the Bill of Complainant that the complainant relied not only upon the deed from said John S. Bell to James L. Crittenden, the said first or original decree in *Bell* v. *Staacke,* and upon said deed executed by Staacke and deposited with the clerk of the court, but also upon other grants, deeds and conveyances stated in said Bill and upon the final decree in said suit of *Kate M. Bell et al.,* v. *San Francisco Savings Union et al,* No. 4,424 and a sale to be made thereunder as provided therein of said 10,067.2 acre tract and upon its right under said last mentioned decree to have all surplus proceeds arising from such a sale of the 10,067.2 acres paid to George Staacke except such portion thereof after the payment of the indebtedness due the San Francisco Savings Union as fixed by said decree,—the said surplus proceeds being received and held by said Staacke under and subject to the trusts upon which said 10,067.2 acre tract of land was granted and conveyed by said Grover and Rosner to said Staacke on March 7th, 1889, by deed made and executed on that date, and of which trusts said John S. Bell was the or one of

the beneficiaries and to which complainant was and is a beneficiary as the successor in interest of said John S. Bell by mesne grants and conveyances.

(4.) In holding and deciding that the deed executed by said George Staacke to Kate M. Bell and James L. Crittenden under the order and judgment in the original decree in said action of *Bell* v. *Staacke,* and deposited by said Staacke with the clerk of Superior Court of Santa Barbara County was so executed by said Staacke "in order to effect a stay of proceedings pending the appeal" from said decree in *Bell* v. *Staacke,* whereas it appears and is alleged in and by the Bill of Complainant that said deed was so executed by said Staacke in compliance with said decree and not otherwise and said fact was not an issue on said separate hearing of said special defense and there was no evidence introduced in relation thereto and no stipulation or admission made in regard to said facts, and said finding and decision as to said matter is contrary to and against the law and the truth.

(5.) In holding and deciding that the said first or original decree in *Bell* v. *Staacke* "was afterwards vacated by the Supreme Court of the State and an entirely different decree entered upon a retrial" and that such a decree on a retrial "was later affirmed by the Supreme Court on appeal" (Tr. p. 294), whereas it appears and is alleged in and by said Bill to the contrary and also appears and is alleged in and by said Bill and is true in fact and law that said first or original decree in *Bell* v. *Staacke*, became and was final, and that neither the Superior Court of Santa Barbara County nor the Supreme Court of the State of California had any jurisdiction, power or authority to vacate, modify or set aside said original decree in *Bell v. Staacke* or to grant a new trial therein or to retry said action of *Bell* v. *Staacke* or to make or render any other or later decree therein or affirm any such later decree: and had a trial on the merits of said Bill been had, it would have been proved that the plaintiff in

said action of *Bell* v. *Staacke,* at all times objected to and protested against any proceeding or proceedings purported to have been had and taken in said action of *Bell* v. *Staacke,* after the dismissal of the appeal from said original judgment therein and also on the appeal taken by the defendants from the order of June 7th, 1901, denying a new trial on the ground that said Superior and Supreme Courts and each of them had no power, authority or jurisdiction to make any order, judgment or decree granting a new trial in said action or to retry said action or to make or enter any other judgment or decree therein.

(6.) In holding and deciding that by such purported second decree in *Bell* v. *Staacke* and a purported sale thereunder of said 10.067.2 acre tract of land every right, title an dinterest of said John S. Bell and his successor in interest became vested in the purchaser at the sale under the commissioner's deed (Tr. pp. 294-295), whereas in fact and in law said purported second decree in *Bell* v. *Staacke* and purported sale and deed thereunder were and each of the same was absolutely null and void for the reason that the court had no jurisdiction, power or authority to make, render or enter said purported second decree or any judical sale thereunder and no title, right or interest was transferred to or became vested in any purchaser at such purported sale or under any commissioner's deed.

(7.) In holding and deciding that the Supreme Court of the State of California was not without jurisdiction to award a new trial in said action of *Bell* v. *Staacke,* after dismissing the appeal from the original judgment therein, whereas it appears and is alleged in said Bill that it was without such jurisdiction and was and is true in fact and in law that it was without any such jurisdiction to award a new trial, and it is provided and declared in and by section 955 of the Code of Civil Procedure of California that "the dismissal of an appeal is in effect an affirmance of the judgment or order appealed from unless the dismissal is expressly

made without prejudice to another appeal' ' and is also provided and declared in and by the Constitution of the State of California (Art. VI) that a decision of the Supreme Court shall be and become final thirty days after the rendition and filing thereof.

(8.) In holding and deciding that the decree in the action of *Kate M. Bell et al.,* v. *San Francisco Savings Union et al,* did not adjudicate and control as to all the rights to titles and interests of the parties to said action of *Bell* v. *Staacke,* and as to the several trusts in Campbell and Kent and in said Staacke, whereas said decree in said later action of *Bell* v. *San Francisco Savings Union* did so adjudicate and control and said 10,067.2 acre tract of land was subject to be sold and could only be sold under and in pursuance of said last-mentioned decree.

(9.) In holding and deciding that the jurisdiction of the Supreme Court of the State of California to award a new trial in an action after dismissing an appeal from the final judgment depends solely and exclusively upon the constitution and laws of the State of California and that the repeated decision of said Supreme Court upholding its jurisdiction is not subject to review in the District Court of the United States or any other tribunal, for the reason that the contrary is true according to the decisions of the Supreme Court of the United States and said Supreme Court of California did not have in said action of *Bell* v. *Staacke, any* power or jurisdiction to award a new trial therein after the dismissal of the appeal from the final judgment upon the purported notice of intention to move for a new trial, prematurely given, served and filed, under the provisions of section 659 of the Code of Civil Procedure and under the settled rule of construction of said section by the Supreme Court of California, and also for the reason that the question of a want of jurisdiction to award such a new trial by said Supreme Court of California in said action of *Bell* v. *Staacke* was upon said Bill a question of fact to be tried and

decided and was subject to review by the United States District Court in which said Bill was filed and pending, and also for the further reason that if said Supreme Court had no such jurisdiction any decision by it that it did have it was null and void and subject to review on said Bill in said United States District Court.

(10.) In holding and deciding that the complainant was by said Bill claiming under said original decree in *Bell* v. *Staacke,* and also at the same time claiming in opposition thereto, whereas the fact and truth is to the contrary.

(11.) In holding and deciding each of the matters and questions held by it adversely to the complainant in its opinion and decision (Tr. pp. 291-296) directing that said decree be entered, for the reason that there was no evidence to support the decision upon said matters and questions or any of them, and also for the reason that the Bill should have been sustained as meritorious and a decision rendered in favor of the complainant upon the special defense passed upon by the court.

(12) In holding and deciding that the Bill was not meritorious and did not entitle the complainant to any relief, for the reason that said Bill was meritorious and sufficient and did clearly show that the complainant was entitled to the relief prayed for in and by said Bell, and also for the reason that said special defense was not an issue raised by said Bill and the merits of the Bill as a whole were not heard or tried by or presented or submitted to the court on the separate hearing of said special defense set up by the answers, and the decision of the entire merits of the Bill as presented by the Bill without a trial thereof upon the whole merits of said Bill and without any opportunity to present evidence and testimony in support of said Bill tended to deprive and did deprive the complainant of the right to be heard and to have a fair and impartial trial on the merits guaranteed to it by the constitution of the United States.

(13) In holding and deciding and in stating in its said decree (Tr. p. 296) that it was "admitted and stipulated by the camplainant that each and all of the judgments, orders and decrees of the Supreme Court of the State of California, of the Superior Court of the State of California, in and for the County of Santa Barbara, and of the Superior Court of the State of California in and for the City and County of San Francisco were rendered, made and entered and all the proceedings taken and acts done thereunder were taken and done substantially as set forth and described in each of said several answers deferring to the answers mentioned in said decree) and particularly in the first defense set out and made in the said joint and several answer of the defendants W. P. Hammon and F. C. Van Deinse," whereas it was not either so stipulated or agreed by the complainant or by the solicitors or counsel for complainant or by any of them and the minutes of said court do not show any such stipulation, and whereas the only admission and stipulation on said hearing was made by the solicitors for both the complainant and the defendants and merely stipulated and admitted that the papers purporting to be copies of said judgments, orders and decrees alleged or claimed to have been rendered and entered in said several courts of the State of California *were subsantially correct copies thereof,* and appellant asserts that said holding and statement about said stipulation and admission was incorrect and not true in fact and tended to and does tend to prejudice and injure the rights of complainant involved in the suit and the the correction thereafter made by the Judge of said court (Tr. p. 323-324) was not sufficient and did not correctly state the admission or stipulation made by the solicitors for the respective parties on the hearing of said special defense.

The appellant in specifying the foregoing particulars and respects in which said decree was erroneous does not waive or on tend to waive any of the specifications of error contained in said assignments of error

on pages 324 to 341, both inclusive, of the transcript, and not only urges each and all of said assignments of error as specifications of error in this brief, but refers to and makes each of the points contained in this brief and numbered I to ..... a specification of error as to said decree and a ground and reason for the reversal thereof.

POINTS AND AUTHORITIES.

POINT 1.

THE SUPERIOR COURT HAD NO JURISDICTION TO HEAR OR GRANT A NEW TRIAL IN ACTION No. 2826, AND HAD THE NEW TRIAL BEEN GRANTED IT WOULD HAVE BEEN THE DUTY OF THE SUPREME COURT TO HAVE REVERSED THE ORDER, FOR THE REASON THAT THE NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL *WAS PREMATURE AND INEFFECTUAL FOR ANY PURPOSE*: AND THE SUPREME COURT WAS, FOR THE SAME REASON WITHOUT JURISDICTION TO REVERSE THE ORDER DENYING DEFENDANTS' MOTION FOR A NEW TRIAL AND TO ORDER A NEW TRIAL, AND FOR THE SAME REASON THE SUPERIOR COURT WAS WITHOUT JURISDICTION TO HOLD A SECOND TRIAL OF SAID CAUSE.

Cal. Code of Civil Procedure, secs. 656, 659;
Hinds v. *Gage,* 56 Cal. 486-488;
Mahoney v. *Caperton,* 15 Cal. 314-316;
Bates v. *Gage,* 49 Cal. 126-128;
Spotteswood v. *Weir,* 66 Cal. 529;
Careaga v. *Fernald,* 66 Cal. 351, 352;
Harris v. *Careaga,* 1 W. C. Rep. 467;
Duff v. *Duff,* 71 Cal. 513-519;
Dominguez v. *Mascutti,* 74 Cal. 269-271;
Bell v. *Marsh,* 80 Cal. 411;

Broder v. *Conklin,* 98 Cal. 360;
Sutton v. *Symons,* 100 Cal. 576-7;
Recl'n. Dist. No. 556 v. *Thisby,* 131 Cal. 572-574;

(a) The foregoing decisions of the Supreme Court of California, constituting a settled rule of construction of sections 656 and 659 of the Code of Civil Procedure of California, in connection with the facts in the case at bar, protect the complainant, a resident and inhabitant of the State of Arizona in the enjoyment of its vested property rights acquired under the deed of September 18, 1902, notwithstanding the later decision of the Supreme Court of California refusing to apply the law of the earlier decisions, in the case of Bell v. *Staacke,* 137 Cal. .....

Gelpcke v. *Dubuque,* 1 Wall. 175-117, L. ED. 520;
Rowans v. *Runnels,* 5 How. 139;
Ohio etc. Co. v. *Debolt,* 16 How. 432;
Havemeyer v. *Iowa Co.,* 13 Wall 303, 18 L. Ed. 42;
Mitchell v. *Burlington,* 4 Wall. 275, 18 L. Ed. 161;
Lee County v. *Rogers,* 7 Wall. 303, 19 L. Ed. 161;
City etc. v. *Lamson,* 9 Wall 486, 19 L. Ed. 730;
Olcott v. *Supervisors,* 16 Wall 678;
Conners v. *Thayer,* 94 W. D. 642, 24 L. Ed. 135;
Douglas v. *Pike Co.,* 101 U. S. 677;
Louisiana v. *Pillsbury,* 105 U. S. 295, 26 L. Ed. 1096.
Taylor v. *Ypsilante,* 105 U. S. 677, 26 L. Ed.
Burgess v. *Seligman,* 107 U. S. 678, 27 L. Ed. 359;
Carroll Co. v. *Smith,* 111 U. S. 563;
Smith v. *Tallapoosa Co.,* 2 Woods 578, 22 Fed. Cas. 13,113;
Burleigh v. *Town of Rochester,* 5 Fed. 672;
So. Pac. R. R. Co. v. *Orton,* 6 Sawy. 195, 32 Fed. 477-478;
Jones v. *Southern Hotel Co.,* 86 Fed. 372;
Percy Summer Club 1. Astle, 163 Fed. 5-14.

If a court act without authority, its judgments and orders are nullities; they are not voidable, but simply void, and form no bar to a recovery sought,

even prior to a reversal in opposition to them; they constitute no justification, and all persons concerned in executing such judgments, or sentences, are considered in law as trespassers. This distinction runs through all the cases on the subject.

Williamson et al v. *Berry,* 49 U. S. (8 How.) 540;
Wilcox v. *Jackson,* 13 Pet. 499;
Shriver's Lessee v. *Lynn et al,* 2 How. 59;
Lessee of Hickey v. *Stewart et al,* 3 How. 750;
Christmas v. *Russell,* 5 Wall. 305;
Thompson v. *Whitman,* 18 Wall. 457;
McElmoyle v. *Cohen,* 13 Pet. 312;
Knowles v. *Gas, Light & Coke Co.,* 19 Wall. 58;
D'Arcy v. *Ketchum,* 11 How. 165;
Webster v. *Reed,* 11 How. 437;
Harris v. *Hardemann,* 14 How. 334;
Kingsbury v. *Yneistra,* 59 Ala. 320.

"A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void. For if it be null, no action upon the part of the plaintiff, no inaction upon upon the part of the defendant, *no resulting equity in the hands of third person,* no power residing in any legislative or other department of the government, can invest it with any of the elements of power or of vitality.

Freeman on Judgments (4th Ed.), Sec. 117, and cases cited.

(b) Federal Courts have co-ordinate jurisdiction with state courts, and are bound to exercise their own judgment as to the meaning of its laws; first when its jurisdiction rests upon diverse citizenship;

Burgess v. *Salegman,* supra;
Kuhm v. *Fairmount Coal Co.* 215 U. S. 349;

second, where there is a conflict of decisions in the state court, and the last in point of time operates to impair

the obligation of contracts and destroy rights that have accrued and become final upon the faith of earlier decisions.

Muhlker v. *N. Y. & H. R. R. Co.,* 197 U. S. 544.

POINT 2.

THE SUPERIOR COURT OF CALIFORNIA WAS WITHOUT JURISDICTION OF THE SUBJECT MATTER TO MAKE AND ENTER A DECREE AND ORDER OF SALE UPON THE PURPORTED SECOND TRIAL OF *Bell* v. *Staacke* No. 2826.

This is clearly so for the reason that prior to the commencement of said action, Staake, at the request of Thomas Bell, and with the knowledge and consent of John Bell had conveyed the 10,067.2 acre tract by deed of trust to the trustees of the San Francisco Savings Union, and both said Saving Union and said trustees were purchasers for value and without notice of the equities of John Bell *and were not parties to said action* No. 2826; said judgment and order of sale were therefore void for want of jurisdiction.

Civil Code of Cal. Sec. 2258
Page v. *O'Neal,* 12 Cal. 483;
Ricks v. *Reed,* 19 Cal. 298;
Warnoeck v. *Harlow,* 96 Cal.
Moore v. *Crawford* 130 U. S. 122-23-24;
Pomeroy's Eq. Jur. Sec. 1053.

An order of sale by a court not having jurisdiction of the res, is void.

Black on Judgments Sec 242;
Ladd & Tillon v. *Mason* 10 Ore. 208;
People v. *Holladay,* 68 Cal. 439;
Munday v. *Vail* 34 N. J. Law. 418;
Clapp v. *M. C. Cable* 84 HMM 379—32 N. Y. Supp. 425.

POINT 3.

THE DECREE IN *Bell* v. *San Francisco Savings Union,* No. 4424, IS A VALID AND CONTROLING DECREE AND A FINAL AND CONCLUSIVE DETERMINATION OF BOTH THE STATUS AND THE RIGHTS OF EACH AND ALL OF THE PARTIES IN *Bell* v. *Staacke,* No. 2826, AS WELL AS FIXING THE STATUS OF THE SAN FRANCISCO SAVINGS UNION AND ITS TRUSTEES AS PURCHASERS FOR VALUE AND WITHOUT NOTICE, OF THE 10,067.2 ACRE TRACT.

(a) In order to have availed herself of the judgment and order of sale in action No. 2826, the defendant, Teresa Bell as administratrix etc., would be required to plead the then pendency of the action of *Bell* v. *Staacke,* No. 2826, in abatement of the latter action of *Bell et al.,* v. *San Francisco Savings Union et al.,* No. 4424 until the judgment and order of sale in the former had become final.

Harris v. *Barnhart,* 97 Cal. 551;
Brown v. *Campbell,* 100 Cal. 635. S. C. 110 Cal 645

(b) Until then the pretended judgment and order of sale in the former action of *Bell* v. *Staacke* could not be pleaded in bar because it could not be used as evidence until it had become final.

Brown v. *Campbell* 110 Cal. 645-650.

(c) Nothing, however, operated to prevent the defendant, Teresa Bell, as administratrix etc., from waiving her right to plead the pendency of the former suit in abatement of action No. 4424, and from waiving her right to subsequently plead and prove the judgment and order of sale in said former action in bar of the latter or from consenting to and having all of said issues tried again, as she did, since she herself and all the other parties to action No. 2826, were also parties to action No. 4424, the later action No. 4424 involving not only all the issues of the former action

but additional issues and parties and the same subject matter and property.

Brown v. *Campbell,* 100 Cal. 646;
Harris v. *Barnhart,* 97 Cal. 546;
Noftzger v. *Gregg,* 99 Cal. 83;
Estate of Blythe, 99 Cal. 472;
Tyrell v. *Baldwin,* 67 Cal. 1-5.

(d) When the rights under a judgment or decree or an estoppel by judgment are waived or not pleaded, *the latest decree prevails,* and rights acquired by virtue of a judgment or decree are liable to be terminated.

Simple v. *Wright,* 32 Cal. 659-668;
Rohms v. *Minis,* 40 Cal. 421;
Rohms v. *Minis,* 40 Cal. 421;
McLean v. *Baldwin,* 136 Cal. 565-569.

POINT 4.

THE JUDGMENT IN *Bell* v. *San Francisco Saving Union et al.,* HAS NEVER BEEN SATISFIED AND THE TRUSTS DECLARDED IN THE DEED OF TRUST FROM STAACKE TO CAMPBELL AND KENT, TRUSTEES, HAVE NEVER BEEN EXECUTED.

(a) In California a deed of trust can have nothing in common with a mortgage except that it may be executed to secure an indebtedness; but in that case, upon default, an action of foreclosure and for an order of sale does *not* lie, but the trustee may sell under and according to the directions of the trust deed.

Koch v. *Briggs,* 14 Cal. 256-263
Fuquay v. *Stickney,* 41 Cal. 583-587;
Whitmore v. *San Francisco Sav. Union,* 50 Cal. 145-150;
Grant v. *Burr,* 54 Cal. 298-301;
Bateman v. *Burr,* 57 Cal. 480-483;
Durkin v. *Burr,* 60 Cal. 360-361;
Savings & Loan Soc. v. *Deering,* 66 Cal. 360-61; 5 Pac. 353;

Hartridge v. *Sheppard,* 71 Cal. 470-78 12 Pac. 480;
Moore v. *Calkins,* 95 Cal. 435-37-38, 30 Pac. 583;
Savings & Loan Soc. v. *Burnett,* 106 Cal. 514-28-39 Pac. 922;
Herbert Kroft Co. v. *Bryan,* 140 Cal. 73-80, 73 Pac. 745.

POINT 5.

APPELLANT'S GRANTOR'S TITLE TO AND INTEREST IN THE 10,067.2 ACRE TRACT WAS CONCLUSIVELY AND FINALLY ADJUDICATED UPON THE FIRST TRIAL OF *Bell* v. *Staacke,* No. 2826.

At the time said action of *Bell* v. *Staacke,* No. 2826, was pending in the courts of California section 659 of the Code of Civil Procedure provided as follows:

> "The party intending to move for a new trial *must,* within *ten days* after the verdict of the jury, if the action be tried by a jury, or *after notice of the decision of the court,* or referee, if the action were tried without a jury, *file with the clerk and serve upon the adverse party a notice of his intention,* designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court, or a bill of exceptions, or a statement of the case."

The above provision of the law went into effect on March 24th 1874 and remained in force until May 20th 1907, when it was amended. The only notice of intention to move for a new trial by defendants in *Bell* v. *Staacke,* was given *before* the trial Judge made and filed his *Additional Findings of Fact and Conclusions of Law,* and no notive of intention to move for a new trial was ever given thereafter.

In a long line of authorities the Supreme Court of California had held, in construing the provisions of section 939 of the Code of Civil Procedure requiring an appeal to be taken within one year after entry of

judgment that the time for appeal from a judgment only began to run after entry thereof, and that notice of appeal given prior to the entry of judgment was premature, and that an appeal based upon such a notice must be dismissed for want of jurisdiction. (*McLaughlin* v. *Doherty,* 54 Cal. 519; *Home of Inebriates* v. *Kaplin,* 84 Cal. 488, 24 Pac. 119; *Wood* v. *Water Company,* 122 Cal. 152, 54 Pac. 726; In re Devincenzi's Estate 131 Cal. 452, 63 Pac. 723.) This doctrine based upon the duty of the court to give effect to the plain legislative intent expressed by a statute was reaffirmed in *Bell* v. *Staacke* 137 Cal. ..... 70 Pac. 171.

The statute limitation of time for taking an appeal cannot be extended, and when it has expired it cannot be arrested or called back by any court.

Conboy v. *First Nat. Bank etc.,* 203 U. S. 141-3 144-5.

The court says:

> "The limitation (of time for appeal fixed by the Supreme Court in accordance with the act) has the same effect as if written in the Statute, and the allowance of an appeal on certificate *cannot operate as an adjudication that it is taken in time.* . . . When the time for taking an appeal has expired *it cannot be arrested or called back by a simple order of court.* If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." *Credit Company Limited,* v. *Arkansas Central Railway Company,* 128 U. S. 258, 261. p. 144-5. Held that the time could not be extended by a petition for rehearing or by court's consideration thereof or order denying such petition
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> *Wood* v. *Bailey,* 88 U. S. 640-641.
>
> The court says: "The failure to give notice to the other party *within the ten days,* whether claimant or assignee, *is equally fatal* to the appeal, as

the failure to give notice to the clerk that the appeal is claimed." p. 641.

Credit Co. etc., v. *Arkansas C. Ry Co.,* 128 U. S. 258-261.

Brady v. *Bernard & K.,* 170 Fed, (C.C.A.) 578.

If the appeal is not taken within the time limited, the appellate court will have no jurisdiction of the case and must dismiss the attempted appeal.

Conboy v. *First Nat. Bank,* 203 U. S. 141,144-5;

Credit Co. etc., v. *Arkansas C. Ry. Co.,* 128 U. S. 258, 261.

Wood v. *Bailey,* 88 U. S. 640, 641.

Brady v. *Bernard & K.* ,170 Fed. 575, 578.

In re Alexander, Fed Case No. 160 Vol. 1, the court says: "The regulation of appeal is a regulation of jurisdiction." Chase, J.

In re Kyler, Fed Case No. 7957;

In re Place Fed Case No. 11200;

Sedgwick v. *Fridenberg,* Fed Case No. 12611.

The construction of section 659 of the Code of Civil procedure relating to the giving of notice of intention to move for a new trial has become equally well settled in the following particulars:

A notice of intention to move for a new trial prematurely given is ineffectual for any purporse and must be denied. In *Crowther v. Rolandson,* 27 Cal. 385, the court construed section 195 of the Act of 1863 which provided that "When an action had been tried by the court, or by a commissioner or a referee," the party intending to move for a new trial should give a written notice thereof within ten days after necessary written notice of the findings of the judge, or the report of the commissioner or referee, and held that even if the court has filed its Findings of Fact, but has sent the case to a referee to take an account, a notice of intention to move for a new trial given before thefiling of

the referee's report is premature. Prior to this the Court had held in constring an early Act providing for notice of motion for a new trial to be given after entry of judgment, that notice given one day before entry of judgment was premature and all proceedings upon the motion were void. (*Mahoney* v. *Caperton,* 15 Cal., 314). In *Bates* v. *Gage,* in an equity case, where special issues had been submitted to a jury and a finding had been made thereon, and later the Court rendered judgment, the court by McKinstry, J., held that a notice given before entry of judgment was premature for the reason that the verdict of the jury upon a portion only of the issues could be regarded only as a portion of the Findings of the Court, and that since "No motion for a new trial was made after the decision of the court below was rendered, an order denying the motion for a new trial must be affirmed." (Italics are ours.) In *Spotteswood* v. *Weir,* 66 Cal. 529, the Supreme Court of California expressed itself concerning a premature notice of motion for a new trial upon the authority of the last case referred to:

> "The action here being on the equity side of the court, the verdict of the jury was but advisory; and until the findings of the jury were adopted by the court, there was no decision and therefore, nothing upon which to base a motion for a new trial. For this reason the notice given by the plaintiff April 9, 1881, was premature and ineffectual and was, therefore, properly abandoned." (Italics are ours.)

Careaga v. *Fernald,* 66 Cal. 351, was an application for a writ of mandamus to compel a referee to settle a statement on motion for a new trial. The findings of the referee together with the judgment were reported on January 9th, 1882, but by direction of the court they were not filed until the 8th day of September 1882. In the meantime and on February 13th 1882 the defendant gave notive of his intention to move for a new trial, concerning which proceeding Judge Ross said:

> "The proceedings thus taken by defendant for the purpose of obtaining a new trial of the action having been taken before the findings and judgment were filed, were ineffectual for any purpose, as was held on appeal taken by the plaintiff in that action from an order made by the court based upon those proceedings granting a new trial. (*Harris* v. *Careaga,* 1 W. C. Rep., 467). Being ineffectual for any purpose they are to be laid out of consideration." (Italics are ours).

Subsequent to the filing of the findings and judgment, and within the statutory time thereafter, the defendant duly served and filed his notice (another and later notice) of intention to move for a new trial and it was the statement in support of this motion which the referee refused to settle. The writ was allowed.

In *Harris* v. *Careaga,* the appeal was from an order overruling a motion to dismiss the motion for a new trial to which reference has just been made, and in reversing the order the court held that the giving of notice of intention to move for a new trial in the time, manner and form provided by law *was jurisdictional.* In rendering the decision Judge McKee says:

> "On that day (September 8,1882) the case was considered as tried to a legal intent; *Hastings* v. *Hastings.* 31 Cal. 95; the decision and judgment were then rendered, and for the first time had a legal existence, upon which the right to move for a new trial could be put in motion. *But the attempt to exercise the right before the decision was ineffectual for any purpose, and the proceedings under it were wholly insufficient as a basis for the motion.* In *Mahoney* v. *Caperton,* 15 id. 314, it was so held of a notice of intention given one day before the rendition of the judgment. And in *Flateau* v. *Lubeck,* 24 Id. 364, it was held that a stipulated statement could not be made the foundation of a motion for a new trial when no notice of intention

> to move had been served and filed. So in *Bear River and A. W. & M. Co.,* v. *Bowles, id.* 654, it is said: 'When no notice of intention to move for a new trial is given or waived, the making and filing of a statement does not give the court jurisdiction over the subject matter of a new trial, and an order granting a new trial will be reversed.' " (Italics are ours.)

In *Hinds* v. *Gage,* 56 Cal. 488 the court by Judge Myrick, Justice Sharpstein, McKinstry and McKee, concurring, (Justice Ross taking no part in the decision because disqualified) held, on the authority of *Crowther* v. *Rowlandson,* supra, that upon a showing of a premature notice of intention given after a decree dissolving a partnership but before the report of a referee appointed to take an accounting was filed, the appeal from the order denying the motion for a new trial would be dismissed.

In *Dorland* v. *Cunningham,* 66 Cal. 485, it was held by the court speaking through Justice McKinstry, Justice Ross and McKee concurring, *that there can be only one valid notice of intention to move for a new trial.*

In *Bell* v. *Marsh,* 80 Cal. 414; the court in construing Section 659 C. C. P. in connection with Section 856 C. C. P. which provides that "a new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees," said:

> "These two sections of the Code must be read together. No proceedings for a new trial can be had until 'after the trial and decision by a jury or court.' In equity cases the findings of the jury are merely advisory. *A case has NOT been tried until ALL the issues have been disposed of* and there has been no decision until the court has passed upon the facts, and drawn its conclusions of law therefrom. . . . To hold that the time to give motice of intention begins to run from the rend-

> tion of the special verdict would necessarily put each party to the trouble, in the protection of his rights, of preparing and prosecuting motions for a new trial before either party knows what the decision of the court is to be."

In *Reclamation Dist. No.* 556 v. *Thisby* (1901) 131 Cal. 574, the court said of a premature notice of intention to move for a new trial:

> "Although certain special issues were submitted to a jury, these issues formed only a portion of the controversy between the parties to the actions, and the remaining issues were tried by the court and findings of fact made by it thereon, upon which together with the answers of the jury to the questions submitted to them, the court rendered its judgment in favor of the plaintiff. The "actions" were therefore tried by the court, and under Section 659 of the Code of Civil Procedure until the court had rendered its decision, it was not competent for either party to give notice of intention to move for a new trial were given and filed November 1, 1897, while the decision of the court was not made until April 21, 1898. These notices were within ten days after the jury had given their answers to the special issues submitted to them, but as the 'actions' were not tried by a jury, the notices were premature *and gave to the court no power to act upon the motion which should thereafter be made under the notices.* (*Bates* v. *Gage,* 49 Cal. 126; *Bell* v. *Marsh,* 80 Cal. 411). No judgment could have been rendered in the case at the time the jury rendered its verdict, and the trial of the action was not concluded until the court had rendered its 'decision' upon all the issues submitted to it." (Italics are ours).

The court also quoted with approval from *Bell* v. *Marsh* to the effect that a case *is* NOT *tried until* ALL *the issues have been disposed of.*

This was the state of the case law of California with reference to the settled construction of the provisions of Section 659 of the Code of Civil Procedure relating to new trials, when the defendants in *Bell* v. *Staacke,* No. 2826, brought on for hearing their motion for a new trial on their notice of intention to move therefor which was given in March 1901, *more than two months before the filing of the additional findings filed on June 7th 1901,* and the trial court properly denied the motion. It had no power or jurisdiction over such a motion other than to deny it, and never thereafter had any power or jurisdiction as the time to serve such notice of intention to move for a new trial expired on or about the 18th of June 1901; neither it nor the Supreme Court could thereafter have any power or jurisdiction to order a new trial in said action and any judgment or order purporting to do so was absolutely void for want of jurisdiction. The decision as completed on June 7th 1901 by the filing of the additional findings became final and could not be changed after the time to serve any notice of intention to move for a new trial expired, for all power and jurisdiction was then terminated and lost. The judgment also became and was final on the 9th day of January 1909, as no valid appeal had been or was ever taken from it.

When a court is without jurisdiction of the subject matter and the parties or of either, every judgment, decree or order made by it is absolutely void and a mere nullity, whether the court be a nisi prius court or appellate court, and any such judgment, decree or order may be attacked collaterally.

Rose v. *Himely,* 4 Cranch 241;
Griffith v. *Frazier,* 8 Cranch 9;
Elliott v. *Peirsol,* 1 Pet. 328;
Voorhees v. *Jackson,* 10 Peters 449;
Shriner v. *Lynn,* 2 How. 43;
Hickey v. *Stewart,* 3 How. 750;
Williamson v. *Berry,* 8 How. 495;
Galpin v. *Page,* 18 Wall 350;

Hamilton v. *Brown,* 161 U. S. 256;

Distinction between error in judgment and usurpation of power is definite; the one denotes cases where a judgment is reversible by the appellate court, the other where it may be declared a nullity collaterally.

Voorhees v. *Jackson,* supra.

The doctrine that a judgment in a case of which the court has once acquired jurisdiction cannot be collaterally assailed is only correct when the court proceeds after acquiring jurisdiction according to established modes governing the class to which the case belongs and does not transcend, in the extent or character of its judgment, the law which is applicable to it; *where the court transcends the limits of its authority, its judgment is not merely erroneous, but is void.*

Winsor v. *McVeigh,* 93 U. S. 274;
Bruner v. *Superior Court,* 92 Cal. 262;
Long v. *Superior Court,* 102 Cal. 452;
Ex parte Giambonini, 117 Cal. 576;
Wilson v. *Walker,* 109 U. S. 258, 3 Sup. Ct. Rep. 277;
Bigelow v. *Forrest,* 9 Wall. 339;
Wilson v. *Walker,* 109 U. S. 258, 3 Sup. Ct. Rep. 277;
Bigelow v. *Forrest,* 9 Wall. 339;
Re Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77;

It is admitted by the answers of all the defendants in the suit at bar that the defendants in *Bell* v. *Staacke* had notice of said additional findings on or *before* July 9th 1901, and as they have not stated particularly the date of such notice, the presumption is that they had such notice when they were filed on June 7th 1901.

Where a party has actual notice of the decision of the trial court no formal service of a written notice of the decision is necessary and the right to

move for a new trial is lost unless notice of intention to move for a new trial is served and filed within ten days after such actual notice of the decision.

Gray v. *Winter in Bank,* 77 Cal. 525;
Mullally v. *Irish Am. Ben. Soc.,* 69 Cal. 559;
Wall v. *Heald,* 95 Cal. 562;
Dow v. *Ross,* 90 Cal. 562;
Calif. Imp. Co. v. *Barotean, in Bank,* 116 Cal. at pages *138-139*;
Estate of Keating, in Bank, 158 Cal. 115-116;

This was also the well settled state of the law upon the subject of motions for a new trial when the plaintiff's precedecessors in interest moved to dismiss the appeals from both the judgment and the order denying defendants' motion for a new trial. The motion to dismiss the appeal from the judgment upon the ground that the notice of appeal was premature was allowed; but, without expressly overruling *Hinds* v. *Gage,* 56 Cal. 486, and *Harris* v. *Careaga* 1 W. C. Rep. 467—2 Cal. Unrep. Cas. 242, the court held that "The premature service of a notice of intention to move for a new trial, might be a good reason for denying the motion, but, does not deprive this court for its dismissal upon the ground that the court has not jurisdiction to hear it." (*Bell* v. *Staacke,* 137 Cal. 308).

Therefore, when in the interval between the decision denying the motion to dismiss the appeal from the order denying defendants' motion for a new trial and the decision upon such appeal, the complainant herein, U. S. Oil and Land Company, a citizen and inhabitant of the Territory of Arizona, could well afford to purchase the interest, which it now claims in the 10,067.2 acre tract in controversy here, upon its faith *in the settled doctrine established by the Supreme Court of California "that a premature notice of intention to move for a new trial was ineffectual for any purpose,"* and was "a good reason for denying the motion;" the

later principle being tacitly admitted by the Supreme Court in its decision denying appellant's motion to dismiss the appeal in the particular case of *Bell* v. *Staacke,* and the merits of which were yet to be decided confessedly according to *the settled construction* which theretofore obtained with reference to section 659 of said Code of Civil Procedure.

The foregoing statement presents a condition of affairs that gave rise to a rule of practice in the Federal Courts of the United States,, established by the leading case of *Gelpcke* v. *Dubuque,* 1 Wall. 175. While it was first thought that the rule then established, would prove exceptional in the strictest sense of the word. The principle and rule maintained in the case, viz: that in the interest of justice and on behalf of a citizen of another state the Federal courts *will not be bound* by the latest decision of a state tribunal construing its own constitution and laws when that decision has been arbitrarily or capriciously made against the law or equity of the particular case, has become well settled by a long line of ably considered Federal court decisions.

The genesis of the doctrine declared in *Golpcke* v. *Dubuke,* which was to become a recognized rule of decision, is to be found in the case of *Rowan* v. *Runnels* 5 Howard 138, which was a case where the plaintiff had acquired rights before any state decision had been made. The supreme court of the United States laid down the doctrine contended for by the plaintiff following which there was a decision by the state court the other way. The supreme court of the United States was then asked to depart from its former ruling and follow the state decision. In refusing to do so Chief Justice Tawney said:

> "Acting under the opinion deliberately given by this court, we can hardly be required by any comity or respect for the state courts to surrender our judgment to decisions since made in the state

> and declare contracts to be void which, upon full consideration, we have pronounced to be valid. Undoubtedly this court will always feel itself bound to respect the decision of the state court, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws. *But we ought not to give them a retroactive effect and allow them to render invalid contracts entered into with citizens of other states, which, in the judgment of this court were unlawfully made. For, if such a rule were adopted, and the comity due to state decisions pushed to this extent, it is evident that the provision in the Constitution of the United States which secures to the citizens of another state a right to sue in the courts of the United States might become utterly useless and nugatory.''* (Italics are ours)

The question as to what position the Supreme Court of the United States would take when called upon to decide a point of construction under a state constitution or law, the state decisions being conflicting, then arose in the case of *Ohio Life & Trust Co.* v. *Debolt,* and Chief Justice Tawney said:

> That if a contract made was valid by the laws of the state, as then expounded by all the departments of its government and administered in its court of justice, *its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, OR DECISIONS OF ITS COURTS ALTERING THE CONSTRUCTION OF THE LAW.''* (Italics are ours)

The significance of *Gelpcke* v. *Dubuque,* following these cases lies in fact that in a case of first impression in the Supreme Court of the United States, between citizens of different states, it will *not* follow the latest decision of the highest court of a state construing its constitution or laws as against the settled rule of

decision theretofore established by the courts of such state in consonnance with justice and the law as to transactions affected by such rule of decision, had before the date thereof.

The Supreme Court of Iowa had repeatedly upheld as constitutional the right of the legislature to authorize municipal corporations to issue bonds in aid of railroads, and the bonds the validity of which was attacked in *Gelpcke* v. *Dubuque,* had been issued, while this was regarded as a true interpretation of the constitution and laws of that state. At the time of the decision in *Gelpcke* v. *Dubuque* the Supreme Court of Iowa in a different unrelated case had held against the validity of similar bonds upon constitutional grounds. In holding the later decision could have no effect upon transactions in the past, however, it might affect those in the future, Justice Swayne said, after quoting from the case of the *Ohio Life & Trust Co.* v. *Debolt* as above set forth:

> "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact a law. *TO THIS RULE, THUS ENLARGED, WE ADHERE. IT IS THE LAW OF THIS COURT. IT RESTS UPON THE PLAINEST PRICIPLES OF JUSTICE. To hold otherwise would be as unjust as to hold that rights acquired under the statute may be lost by its repeal.* The rule embraces this case. . . . . It is the settled rule of this court in such cases to follow the decisions of the state court but there has been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. *We shall never immolate truth, justice and the law, because the state tribunal has erected the alter and decreed the sacrifice.*" (Italics are ours.)

Gelpcke v. *Dubuque,* was soon after directly affirmed *Havemeyer* v. *Iowa,* 3 Wall. 303 and *Thompson* v.

Lee County, 3 Wall. 331. The authority of these cases was strengthened and the limits of the application of doctrine of the independence of the Federal courts in cases depending solely upon diverse citizenship greatly extended by the decision in the case of *Burgess* v. *Seligman* 107 U. S. 20, 33-34. In that case it appeared that there was no decision of the state court controling the validity of the contract in controversy at the time it was made, but that while the validity of the contract was *sub judice* in the Federal Courts in the principal case, the Supreme Court of Missouri on the puestions involved therein, and in the very transactions then engaging the attention of the Supreme Court of the United States had reached a contrary conclusion to that reached in the Circuit Court. In affirming the judgment of the latter Court, the Supreme Court of the United States speaking through Justice Bradley said:

"We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions occured, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the state tribunals contrary to that given by the Circuit Court. *The Federal Courts have an independent jurisdiction in the administration of state law, coordinate with, and not* subordinate to that of the state courts, *and are bound to .exercise their own judgment as to the meaning and effect of those laws.* The existence of two co-ordinate jurisdictions in the same territory is pecular and the results would be anomolous and inconsistent but for the exercise of mutual respect and deference. Since the ordinary administration of law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal

Courts no less than by the state courts themselves, as authoritive declarations of what the law is. But where the law has not been thus settled it is the right and duty of the Federal Courts to exercise their own judgments; as they always do in reference to the doctrine of commercial law and general jurisprudence.
So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or there has been no decisions of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued.''

In *Jones* v. *The Great Southern Hotel Co.* 86 Fed. 370, the Supreme Court of Ohio had held the provisions of a mechanics' lien law invalid upon constitutional grounds in another case after the rights of the lienors had accrued under the law, *and the Circuit Court of Appeals refused to follow the decision of the state court upon the authority of the foregoing cases.*

In the case of the *Southern Pac. R. R. Co.* v. *Orten,* 6 Sawy. 195, 32 Fed. 372, Judge Sawyer sitting in the Circuit Court for the Ninth Circuit had to consider the question arising under the constitution of California upon which there were two conflicting decisions in the state court, *and held in favor of the rule established by the earlier decision which had been acquiesced in some eleven years before the later decision was announced,* and based his ruling upon the ground that the act, the validity of which was in question and by reason of which the defendant's right had become vested, was passed and acted upon by the parties *while the earlier decision was in force.*

The law of *Gelpcke* v. *Dubuque,* has been applied by a number of the states in support of the doctrine that a settled rule of decision enters into and becomes a part of a contract at the time that it is made. The Alabama court has said:

"It may be said to be a dormant stipulation of the contract and *it must be enforced as a part of it, and as it is construed at the time of entering into it.*"

Napier v. *Jones,* 47 Ala. 96.

The same court has refused to give effect to its own later decision where to do so would cause them to operate retroactively and invalidate a conveyance by a husband to his wife which was good under its former decision at the time it was made.

Farrior v. *New England Mortg. Sec. Co.,* 92 Ala. 175

The Indiana Supreme Court upon the strength of the rule contended for here has refused to give retroactive effect to the later decision changing the rule of descent, *when to do so would invalidate deeds made,* and limits the quality and quantity of the estates acquired under the rule of earlier decisions.

Stevenson v. *Bordy,* 139 Ind. 65-66;
Haskett v. *Maxey,* 134 Ind. 183.

Other cases that may be cited in support of the same general principle are *Hall* v. *Wells* 54 Miss. 301-302; *Hemden* v. *Mowe,* 15 S. Car. 354-455; *State* v. *Comptoir National D'Escompte de Paris* 51 La. Ann. 1278; *Long* v. *Walker* 105 N. Car. 90.

The case of *Muhlker* v. *N. Y. etc. R. R. Co.,* 197 U. S. 54,449 L. Ed. 873-878, was before the Supreme Court of the United States upon writ of error of the Supreme Court of the State of New York and brought directly before the court for decision the question of the controling influence of a decision of the state court and its effect upon plaintiff's rights acquired by contract. Upon the facts of the case the court proceeded in a direct line to establish the doctrine that a state may not impair rights arising out of a contract by reversing decisions of its courts in cases establishing the law of such contracts at the time they were entered into. In reaching this result the court said:

"When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

"And this is the ground of our decision. We are not called upon to discuss the power, or limitations upon the power of the courts of New York to declare rules of property or change or modify their decision, but only to decide that *such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and exent of such contract.* This is a truism; *and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and measure the rights under it.* Hence the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property."

The true significance of this decision cannot be entirely understood separate and apart from the vigorous dissenting opinion of Mr. Justice Holmes.

The latest expression of the court upon this subject was in a case which runs true to the earlier cases, like the suit at bar; and the decision was rendered on a certificate from the United States Circuit Court of Appeals for the Fourth Circuit, in an action of trespass on the case between citizens of different states. The question presented was whether the Federal Courts are bound by a decision of the highest state court on the question of subsequent support, handed down after the rights of the parties were fixed. In assuming in the negative the court affirms *in toto* the doctrine laid down in *Burgess* v. *Seligman* in the words already quoted from that decision, and against the strong dissent of Mr. Justice Holmes, establishes the rule that in

the absence of any prior decision of the state court fixing the rights of the parties under a contract, the Federal Courts are not bound to follow a later decision of the state court, but may give effect to its own judgment as to what was the law of the state applicable to the contract when the rights under it acrued. The dissenting opinion concedes, however, the rule of *Gelpcke* v. *Dubuque* that settled decisions of state courts "make law for the state," and that "The principle is that a change of judicial decision after a contract has been made upon the faith of an earlier one is a change of the law."

This is indubitably the law of the suit at bar; and, we respectfully submit, this court will not concern itself with the decision of the Supreme Court of California in *Bell* v. *Staacke,* 141 Cal. 186, further than to note that in disposing of the respondent's "preliminary" contention that the defendants' motion for a new trial was properly denied by the lower court "because the notice of intention to move for a new trial was prematurely given," the courtignores its previous decisions to the contrary, and cites no authority for its later unique, exceptional and solitary decision. This later unique decision in *Bell* v. *Staacke* in conflict with all previous decisions was rendered on November 30th, 1903, and between the date thereof and March 20th, 1907, when section 659 of the Code of Civil Procedure was so amended as to provide that "The party intending to move for a new trial must within ten days *after receiving notice of the entry of the judgment,* file with the clerk and serve upon the adverse party a notice of his intention, etc., etc.," It does not appear that the decision reported in 141 Cal. has ever been referred to as authority to sustain its unique and exceptional ruling that the fact of a premature notice of intention to move for a new trial may be disregarded. It does not appear that the question has ever been raised since section 659 was amended.

POINT 6.

THE PURPORTED JUDGMENT AND ORDER OF SALE ENTERED UPON THE SO-CALLED TRIAL OF *Bell* v. *Staacke,* No. 2826 IS VOID, AND THE DEFENDANT TERESA BELL AS ADMINISTRATRIX TOOK NOTING THEREBY OR UNDER THE COMMISSIONER'S DEED PURPORTING TO CARRY THE TITLE TO THE 10,000 ACRE TRACT.

After entertaining jurisdiction of the appeal from the order denying defendants' motion for a new trial, the Supreme Court of California in *Bell* v. *Staacke,* 141 Cal. 186, 195 et seq. held that upon the conveyance of the 10,000 and 4,000 acre tracts to Staacke by Grover and Rosener by deed of March 7, 1889, the evidence did not sustain the finding that a lien was not created upon the 10,000 acre tract in favor of Thomas Bell, and upon that ground made the order purporting to reverse the order denying a new trial.

It is an admitted fact by the pleadings in the suit at bar that subsequently to the conveyance to Staacke by which the mortgage lien that was sought to be foreclosed upon the purported second trial of action No. 2826, but prior to the commencement of that action, to-wit by a grant dated February 1, 1892 and recorded on February 3, 1892, Staacke conveyed by deed of trust, the legal title of the 10,000 acre tract to Campbell and Kent, as trustee to secure the loan evidenced by the note of Thomas Bell and Staacke for $60,000. It is also admitted that neither the trustees above named, nor their successors nor the Savings Union were parties to the action No. 2826.

In California it has been the law ever since the decision of *Koch* v. *Briggs* and on down to the decision in *Weber* v. *McCleverty,* 86 Pac. 706, that a deed of trust of real estate taken as security for the loan of money, *conveys the legal title and vests the grantee with all interest in the land, which remains until the trust*

is executed or is terminated by payment. (See points and authorities.)

By an equally long and unbroken line of decisions commencing with *Boggs* v. *Fowler,* 16 Cal. 559, 76 Am. Dec. 561, it has been a settled rule of law in California as elsewhere under the "lien theory" of mortgages that a foreclosure suit is only a proceeding *for the legal determination of the existence* of a lien, the ascertainment of its extent, and the subjection to sale be heard; and to give validity to a foreclosure decree, of the estate pledged; that upon the validity and extent of that lien the mortgagor or his grantee, has a right to the owner of the legal title of the premises is an indispensible party, *and no valid order of sale can be made in any such suit to which he is not a party.*

That the title to mortgaged premises are wholly unaffected by such a sale is shown by the decisions.

Carpenter v. *Williamsen,* 25 Cal. 154 is to the effect that where a purchaser at a mortgage sale acquires no title for failure to make the grantee of the mortgagor a party to the foreclosure, the mortgage, decree of sale, and sheriff's deed are not relative testimony to show title in the purchaser at the sheriff's sale.

In *Skinner* v. *Buck,* 29 Cal. 253-257 in construeing section 309 of the Practice Act which provided in part that "The creditor may maintain his action against the mortgagor alone", the court said: "the main and only purpose of the section was to save foreclosure suits from abatement on the ground of non-joinder of incumbrances whether prior or subsequent. Morehead was not an incumbrancer but the absolute owner of the mortgaged premises in so far as it was covered by his deed from Ruckel. Though not 'mortgagor' yet he stood in the mortgagor's shoes. The purpose of the section was that the owner of the mortgaged premises, at least, should be made a defendant in foreclosure, and the 'mortgagor' is put in by way of sample or illustration. Otherwise, we are driven to the some-

what startling conclusion, that it was the intention of the Legislature, in case the mortgagor should convey the whole of the mortgaged property, not only that the suit to foreclose might be brought against the 'mortgagor alone', but that the decree obtained in the action should find his grantee as implicitly as if his name and interest had been represented upon the record."

In a note to *Berlack* v. *Halle,* 22 Fla. 236, 1 Amer. St. Rep. 185,189, the learned editor of the latter reports says in connection with the rule making a subsequent grantee of a mortgagor an indispensible party to foreclosure:

"In many of the states the effect of a mortgage as a conveyance of the legal title has been destroyed by exactments which convert it into a mere lien upon the the property. The obvious consequences of the retention of the legal title of the mortgagor is his ability to convey such title at his pleasure. It is true that the title is still subject to the mortgage lien, but when the lien is to be made effective by proceedings to appropriate the title to its satisfaction, *there can be no question that such title can be reached only by some proceeding directed against the party by whom it is held.* It is incomprehensible that any person should have concieved the idea that the title could be divested under foreclosure proceedings against the mortgagor, *commenced at a time when he retained no interest in the property, and the proper evidence of his transfer was upon the records of the county in which the land was situate.* Yet, at least in some of the states, the early foreclosure proceedings very generally ignored transfers made subsequent to the mortgage and prior to the institution of such proceedings. It is clear that an execution or judicial sale can have no greater operation than could a conveyance of the property, executed by all the parties at the commencement of the action or proceeding. What they can not do voluntarily, they cannot be made to do by compulsion. The conveyance, though executed by an officer of the law or of the court, is, nevertheless, in

legal contemplation, their conveyance, and theirs alone. Hence it can not divest the estate of their grantees by grants duly executed and recorded prior to the pendency of the suit''. (citing *Goodman* v. *Ewer, Boggs* v. *Hargrave, San Francisco* v. *Lawton,* supra).

Another and controlling principle of law rendering the San Francisco Savings Union and their trustees as indispensible parties to action No. 2826 is applicable to and arises out of the admitted fact in the suit at bar that the San Francisco Savings Union and its trustee *were purchasers for value and without notice of the equitable title of John S. Bell* to said 10,000 acre tract. This fact was conclusively established by the decree in action No. 4424, is affirmatively alleged in the answers of the defendants, Teresa Bell, as administratrix etc., and of the defendants Hammon and Van Deinse, and binds all the parties to the present litigation. The principle referred to is that purchasers for value of trust property, and without notice, take a perfect title, discharged from the trust and from all equitable claims and so that no outstanding estate of any kind, legal or equitable, is left.

Civil Code sec. 2243;
Paige v. *O'Neal,* 483-498-499
Ricks v. *Reed,* 551-577;
Warnock v. *Harlow* 298-306 *et seq.*;
Moore v. *Crawford,* 130 W. S. 122;
Pomeroy's Eq. Jurisprudence, sec. 1053.

Any of the foregoing considerations singly, to say nothing of them in combination, would be sufficient ground upon which to hold the pretended second judgment and order of sale in action No. 2826 void for want of jurisdiction of the subject matter of the attempted foreclosure then sought to be obtained on a cross-complaint. That Staacke had no interest in the 10,000 acre tract which could be made the subject of foreclosure and sale was definitely determined by the findings in all the actions referred to in the pleadings in the suit at bar, as well as by the Supreme Court of

California in its decision on affirming the decision in *Bell et al* v. *San Francisco Savings Union.*

Staacke, under the agreement between John and Thomas Bell, as merely a naked trustee of the legal title, but by and under the *record, title and conveyances* he was the absolute owner in fee with no outstanding right, title, interest or equity in any other person,—and as such absolute owner in fee he deeded and conveyed all the title and interest that he had to the trustees of the San Francisco Savings Union, who as bona fide purchasers for value without notice took, received and held the absolute and whole title in fee free from every title, right or claim, legal or equitable, of John S. Bell and Thomas Bell. Nothing was then left in either John S. Bell or Thomas Bell, and nothing could have been left in Staacke as he never had anything but the naked legal title and all of the legal title passed out of and from him to the trustees of said San Francisco Savings Union.

It is important to call the attention of the court at this time to the fact that notwithstanding the trial judge dismissed the suit at bar upon the theory that all the questions raised by the pleadings had been adjudicated and were conclusively determined by the judgments in actions No. 2826 and No. 4424 and by the final determination of the appeals therefrom by the Supreme Court of California, that neither the effect of said judgment and order of sale entered upon the second trial of action No. 2826, nor the point which we will next make to the effect that the judgment in action No. 4424 is the last and controlling adjudication of the rights of all the parties to the litigation, past as well as present, have been passed upon by any court or courts whatever, and that these two questions are here first presented in any court for hearing, trial or adjudication.

POINT 7.

THE DECREE IN *Bell* v. *San Francisco Savings Union et al;* action No. 4424 IS VALID AND CONTROLLING AS A FINAL AND CONCLUSIVE DETERMINATION OF THE RIGHTS OF ALL THE PARTIES TO *Bell* v. *Staacke,* action No. 2826, AND ALSO OF THE STATUS OF THE SAN FRANCISCO SAVINGS UNION AND OF ITS TRUSTEES AS PURCHASERS FOR VALUE AND WITHOUT NOTICE.

Bell v. *Savings Union* was brought after the commencement and before the trial of *Bell* v. *Staacke.* The parties to *Bell* v. *Staacke* were all of them parties to *Bell* v. *San Francisco Savings Union,* and the San Francisco Savings Union and its original trustees as well as their successors, were parties only to and in the later action. *The findings of fact and conclusions that the issues therein, though they are broader than those raised in Bell* v. *Staacke, included all those passed upon and decided on the trial and on the pretended several trial of Bell* v. *Staacke*— that each and *all* of of the material facts and issues raised in *Bell* v. *Staacke* were again involved, pleaded and tried in *Bell* v. *San Francisco Savings Union et al,*—that the decision thereof was necessary to give force and effect to the judgment in *Bell* v. *San Francisco Savings Union*— that all of said issues were tried and adjudicated as issues involved and to be decided in said later suit in which all parties interested were brought in,— and that in said later suit said court with a mere mention of the pendency of the former suit of *Bell* v. *Staacke* adjudicated conclusively the status of Staacke as trustee of the trusts created by the deed of Grover and Rosener of March 7th 1889. The court in finding 40 (Tr. p. 71) merely states: "That said action so commenced on the 8th day of March, 1893 by said John S. Bell against said defendant George Staacke and said executors at that time of the last Will and Testament of Thomas Bell, deceased, is still pending in this court and is num-

bered 2826 in the register of actions and proceedings in the office of the clerk of this court and the relations between said John S. Bell and his grantees of said first above-described of said two several tracts of land on the one hand and said defendants George Staacke and Teresa Bell as administratrix of the estate of Thomas Bell, deceased, with the will annexed, on the other hand in respect of said indebtedness of said John S. Bell to said Thomas Bell and in respect of said first above-described of said two several tracts of land and all or any parts thereof are involved in said action and constitute the subject matter thereof and are in course of judicial determination and settlement therein. The court then finds as a conclusion of law that the grant in trust by Staacke to Campbell and Kent "is a good and valid grant of the piece or parcel of land therein described upon the trusts therein mentioned, whereof said defendant Mercantile Trust Company of San Francisco is now the trustee and that this court *having been vested by this action* with jurisdiction with respect to said two several tracts of land for the purposes of determining the issues raised herein by the complaint of said plaintiff and the answers thereto retain said jurisdiction for the purpose of doing complete justice and determining completely all controversies with respect to said two tracts of land". Even if the language in said finding 40 could be construed to be an attempt to except the decision in *Bell* v. *Staacke* from the decision in the later suit which cannot be done under the rule of *expressio unius est exclusio alterius, the findings in Bell* v. *San Francisco Savings Union would limit the effect of the judgment in Bell* v. *Staacke to determining only "the relations between John S. Bell and his grantees of the first of the above-described several tracts of land (the* 10,000 *acre tract) one the one hand, and the said defendants George Staacke and Teresa Bell, as administratrix of the estate of Thomas Bell, deceased, with the will annexed, on the other hand in respect to said indebtedness of John S. Bell to said Thomas Bell and in respect of said first above-described of said two several*

tracts of land and all and any parts thereof were involved in said action and constituted the subject matter thereof'' (Findings of Fact No. 40 Tr. p. 71), *and any idea that the judgment and order of sale thereafter to be made* in *Bell* v. *Staacke* would control the title to the 10,000 acre tract to be disposed of under the judgment and deed of trust in *Bell* v. *Savings Union,* was completely negatived by the order contained in the latter judgment requiring the land to be sold according to the provisions of the deed of trust, and directing that the balance of the proceeds of the sale remaining after payment of the indebtedness secured to the Savings Union and the expenses of the trust, should be paid ''to said defendant, George Staacke, his heirs or assigns,etc., (meaning successors).

The *judgment* in *Bell* v. *Savings Union* was entered on the 14th day of March 1905, the *decision* having been rendered also on that date. The pretended judgment on the purported second trial of *Bell* v. *Staacke* was entered on October 28th 1904, the *decision* having been rendered on the 17th day of October 1904. The pretended second judgement in *Bell* v. *Staacke,* if the court had jurisdiction to make it, became final February 2, 1906 or thirty days after the dismissal of the appeal from the judgment (*Bell* v. *Staacke,* 148 Cal. 404) and the judgment in *Bell* v. *San Francisco Savings Union et al* became final thirty days after February 14th, 1908, the date of the affirmance thereof by the supreme court. (*Bell* v. *Savings Union,* 153 Cal. 64)

The judgment in *Bell* v. *Savings Union* is unquestionably the latest and controls the parties upon all issues litigated therein which were common to that action and the action of *Bell* v. *Staacke.*

If rights under former judgments are to be relied upon they must be pleaded in bar and given in evidence dence, and in the absence of such practice the later judgment controls the former.

Freeman on Judgments, Sec 332;
Simple v. *Wright,* 32 Cal. 659;

Simple v. *Ware,* 42 Cal. 619
Cooley v. *Brayton,* 16 Iowa 10.

Under the Code practice in California a former judgment must be pleaded in bar under the requirement that the answer of the defendant, in every case, must contain a statement of "any new matter constituting a defense."

Black on Judgments, Sec. 789;
Piercy v. *Sobin,* 10 Cal. 22-70 Amn. Dec. 692.

And a former recovery, whether obtained *before or after the joining of the issue,* cannot be given in evidence, in any action whatever, under a general denial of the allegations of the complaint *or under an allegation in the answer, of the pendency of the action wherein the recovery was had.*

11 Black on Judgments, Sec. 789
Henricks v. *Decker,* 35 Barf. 299;
Brazill v. *Isham,* 12 N. Y. 9.

The rule emphasized above has been established with peculiar force in California, and the practice whereby a judgment to be entered in a pending action between the same parties and concerning the subject matter, may be used as evidence in an action commenced later in point of time has been definitely settled. Under such circumstances in California, the pendency of the former action *must be pleaded in abatement until the judgment to be entered therein, has become final* for until then the judgment can not be used as evidence.

Brown v. *Campbell,* 110 Cal. 645-650;
Harris v. *Barnhart,* 97 Cal. 551;
Brown v. *Campbell,* 100 Cal. 635;

In re. Blythe, 99 Cal. 472, a failure to plead the judgment and give it in evidence operated as a waiver of the rights or the estoppel claimed under it.

11 Black on Judgments, Sec. 786;
Simple v. *Ware,* supra;
Simple v. *Wright,* supra;
Rohms v. *Minis,* 40 Cal. 421;

Tyrell v. *Baldwin,* 67 Cal. 1-5;
Harris v. *Barnhart,* 97 Cal. 546;
Noftzger v. *Gregg,* 99 Cal. 83;
Estate of Blythe, 99 Cal. 472;
Brown v. *Campbell,* 100 Cal. 646;
McLean v. *Baldwin,* 136 Cal. 565-69.

Under the doctrine of these cases it becomes clearly evident that the Finding No. 40 in *Bell* v. *Savings Union,* relative to the pendency of the former action is not predecated upon any issue joined upon the fact of a former adjudication between the same parties, which would bar the recovery in *Bell* v. *Savings Union,* or which would operate as an estoppel against any of the parties to the last mentioned action; but on the other hand that finding, *ex proprio vigore* negatives such a presumption of fact.

Referring to the sequence of events connected with the trials, the decisions and the final judgments in the two actions, and bearing in mind that the decree in *Bell* v. *Savings Union* was not made until the 14th day of March, 1905, the defendant, Teresa Bell, as administratrix, etc., and the other defendants, had ample time following the entry of the pretended judgment in *Bell* v. *Staacke,* of October 28 1904, within which to move to vacate and set aside the submission of the cause in *Bell* v. *San Francisco Savings Union et al.,* and for leave to file a supplemental answer setting up her pretended judgment and order of sale and to demand an abatement or continuance of the later action until the purported judgment became final, thereby asserting or attempting to fix her status as the person claiming to be the lawful redemptioner under the deed of trust from Staacke to Campbell and Kent, trustees of the San Francisco, Savings Union; instead of doing this, however, *she waived her rights,* (if any she had) *thereunder and under any estoppels created thereby and allowed the court to enter a judgment recognizing "Staacke his heirs and assigns" (successors) to be the only true redemptioner from any sale made in pursu-*

ance of said trust deed, or under its decree in said suit of *Bell et al.,* v. *San Francisco Savings Union et al.,*

How completely the said defendant Teresa Bell as administratrix etc., waived her rights (if any she had) to any relief under the said purported judgment and order of sale in *Bell* v. *Staacke,* not only in *Bell* v. *San Francisco Savings Union*, but also in the suit at bar is shown by the fact that it nowhere appears that she ever pleaded the pendency of the former action of *Bell* v. *Staacke,* in abatement of *Bell* v. *San Francisco Savings Union* or any exception to any erroneous ruling of the court refusing to make any order of abatement or continuance, or that there was ever such ruling. Failing to have taken these precautions she cannot now be heard to urge said purported judgment and order of sale in *Bell* v. *Staacke*, either as an estoppel or as an adjudication of any fact or issue decided in the later suit of *Bell* v. *San Francisco Savings Union et al.,*

Upon this point and question the Supreme Court of California in the analogous case of *Brown* v. *Campbell,* 100 Cal. 647 said:

> "But while the judgment in *Priest* v. *Brown,* was not for the reason stated (that it had become final) a bar to the cause of action alleged in the cross-complaint, still the pendency of that action would have been good ground for the continuance of this until the final determination of the former action, or would have been a sufficient basis for an order dismissing the present action upon the motion of the plaintiff, notwithstanding the affirmative relief demanded by the defendant Priest in his cross-complaint *and the refusal of the Court to have granted either of such motions* would, perhaps, have been erroneous; but no such motion was made by the *plaintiff still insisting upon the judgment in Priest* v. *Brown et al., as an estoppel and as grounds for a judgment in his favor.* Under these circumstances we cannot say that the court erred in proceeding to the trial, although it might

well have continued the case on its own motion until the final determination of the former action." (the Italics are ours).

Brown v. *Campbell,* 100 Cal. 647.

In the trial of said suit of *Kate M. Bell et al.,* v. *San Francisco Saving Union et al.,* in which there were other and additional parties to those in the suit of *Bell* v. *Staacke* and in which the U. S. Oil and land Land Company was for the first time a party in or to any suit or litigation affecting the property and was brought in by the cross-complaint of defendants as a defendant to said cross-complaints, it became necessary and it was the duty of the court upon the allegations of said cross-complaints filed by said San Francisco Savings Union and by its trustee, Mercantile Trust Company of San Francisco, and by said Teresa Bell as such administratrix, to find the facts and make its decision upon all the issues raised by said cross- complaints and the answers thereto as well as all issues raised by the complaint and to decide what disposition, should be made of the surplus proceeds of the sale of said 10,067.2 acre tract, as the said cross-complainants alleged at length the trust and the trust deed executed by said Staacke to Campbell and Kent and prayed that the court would direct the execution of the trust created by said deed. The court in said suit of *Bell et al.,* v. *San Francisco Savings Union et al.,* could do this and so decide and direct only upon the evidence legally before it, and that evidence did *not* include said purported judgment and order of sale claimed by defendants to have been made and entered on October 2nd 1904 in said action of *Bell* v. *Staacke;* and therefore, the judgment and decree in *Bell et al* v. *San Francisco Savings Union et al* directing the payment of such surplus proceeds "*to said defendant George Staacke, his heirs or assigns*" can have no possible reference to any right, title, interest or estate claimed by said Teresa Bell as such administratrix or by any of the defendants to said suit of *Bell* v. *San*

Francisco Savings Union under said purported or pretended judgment and order of sale in *Bell* v. *Staacke.* A reference to the Findings of Fact Nos. 24-31 (Tr. pp. 53-65) in said suit of *Bell et al* v. *San Francisco Savings Union* will show the trust upon which the surplus proceeds over and above all moneys due the San Francisco Savings Union were ordered and adjudged in and by the decree in said suit of *Bell et al* v. *San Francisco Savings Union et al* to be paid to "*George Staacke his heirs or assigns.*" Said provision in said *decree* requiring the payment of such surplus proceeds to be made to "*George Staacke his heirs or assigns*" is taken and derived, like all of the other provisions of said decree relating to the sale of said 10,067.2 acre tract, directly from the deed of trust made by said Staacke to Campbell and Kent, and is of absolutely no significance as to any pretended right, title or interest of any of the defendants or of said Teresa Bell as such administratrix or of any pretended claim or right on her part as a purported purchaser under such pretended judgment and order of sale in *Bell* v. *Staacke*; but on the other hand, it clearly establishes decisively the character of the interest which said Teresa Bell as such administratrix received and now holds any title or right to said 10.067.2 acre tract under the purpoted conveyance thereof made and executed to her by said Mercantile Trust Company and said San Francisco Savings Union, namely, that of an involuntary trustee standing in the shoes of said trustee Staacke and under the obligation to administer and execute the trust created in and by said trust deed of Grover and Rosener to said Staacke, and upon exactly the same terms and conditions with respect to the land itself as were found and decreed by the court in said suit of *Bell et al* v. *San Francisco Savings Union et al,* with reference to such surplus proceeds as might arise from the sale of said 10,067.2 acre tract when made under and in pursuance of said decree and in accordance therewith and with the terms of said trust deed executed by Staacke to Campbell and Kent.

The net result to the complainant in this suit must be the same whether this court holds the said pretended decree and order of sale in *Bell* v. *Staacke* valid to pass the whole and only interest Staacke had in said 10,067.2 acre tract as trustor under said deed in trust to Campbell and Kent, viz.: the right to have the legal title thereto reconveyed to him upon the payment of the debt to the San Francisco Savings Union or to the surplus proceeds arising from any sale under said trust deed executed to Campbell and Kent and the right in case of such payment to have the equitable titles thereby revived in John S. Bell or his grantees,—or whether it holds, as we contend, that the court in *Bell* v. *Staacke* was without jurisdiction over the subject matter and also without jurisdiction to make, render or enter any such pretended judgment and order of sale, and that Teresa Bell as such administratrix by paying the amount of indebtedness adjudged and decreed in *Bell et al* v. *San Francisco Savings Union et al* to be due to the San Francisco Savings Union and secured by both of said tracts of land became an involuntary trustee of the trusts as to said 10,067.2 acres under said deed executed by Grover and Rosenor to said Staacke. The decree in said suit of *Bell et al* v. *San Francisco Savings Union et al,* became and was final, binding and conclusive upon each, every and all parties thereto and upon their successors in interest and was not and could not be affected or modified in any way or manner by any judgment or decree in *Bell* v. *Staacke* or by either of the judgments purported to have been made and entered therein, *for neither of them was pleaded in bar or abatement.* The voluntary payment by Teresa Bell as such administratrix of the amount due the San Francisco Savings Union in satisfaction of the claim proved against the estate of Thomas Bell many years before any judgment or decree in either of said suits, was made by her *as a joint obligor* on the note of $60,000 made by Staacke to the San Francisco Savings Union and *the payment of which was guaranteed by said Thomas Bell.* She as such administratrix

of Thomas Bell in making said payment merely performed and complied with the obligation and duty of Thomas Bell as guarantor on said note of $60,000. The subsequent ratification by John S. Bell of the use by said Staacke and Thomas Bell of said 10,067.2 acre tract jointly with the 4,000 acre tract to raise and borrow for Thomas Bell said $60,000, though the amount thereof was subsequently credited to the account of John S. Bell, did not and could not affect, alter or change the guarantee of the payment of said $60,000 by Thomas Bell which was endorsed upon said note, for the ratification was of the transaction and loan as an entirety and there is and was no evidence or finding or decree of any consent on the part of the San Francisco Savings Union or its trustees to any alteration, change or modification of said original transaction or of the obligation assumed by Thomas Bell as guarantor, and it is found and adjudged (Tr. p. 68) that on the 27th day of April 1893 and within the time allowed by law for the purpose said San Francisco Savings Union duly presented to the executors of the estate of Thomas Bell, deceased, its duly verified claim against the estate of said Thomas Bell, deceased, *founded on said promissory note and said guarantee of the payment thereof by said Thomas Bell* and that said executors endorsed thereon their allowance of said claim, and that thereafter on the 17th day of May 1893 said claim was allowed and approved by a judge of the Superior Court of the city and county of San Francisco in manner and form as prescribed by law. This claim became and was from May 17th 1893 a valid and binding judgment upon the estate of Thomas Bell, deceased, and payable out of the moneys of said estate. The defendants in the suit at bar in and by their answers state and allege under oath (Tr. pp. 119-120, 150) "that *prior* to making the payment of said $179,400.40, to-wit, on the 12th day of June 1908, *the Superior Court of the city and county of San Francisco, state of California, made and entered its ORDER AND JUDGMENT in the matter of the said*

Estate of Thomas Bell, deceased, whereby it ordered and adjudged that Teresa Bell as such administratrix pay from the money and funds of the said estate the sum of $179,411.40 to said San Francisco Savings Union in discharge and settlement of the amount due said San Francisco Savings Union on its said secured claim proved and allowed against said estate."

But again we press upon the attention of the court the argument that, conceding the validity of the pretended judgment and order of sale in *Bell* v. *Staacke,* it was absolutely necessary under the California law and practice for Teresa Bell as administratrix to plead the pendency of that action and the judgment therein in abatement of *Bell* v. *San Francisco Savings Union* until the judgment in the former action became final, and then to plead and prove the same in bar in the latter. The position of Teresa Bell as administratrix etc., in the suit at bar is exactly the same as that of the appellants in the case of *Brown* v. *Campbell,* 110 Cal. 650. The court says:

> "When the present action was commenced, the action of *Priest* v. *Brown et al* was pending in the same court, and had not been tried. The main issue in that action was whether Priest had the right to subject the lands described in the complaint to the payment of his claim against Joseph Brown. After Priest had been made a defendant in the present action at the instance of the appellants, Campbell and Kent, he filed an answer in which he pleaded the pendency of the former action and the identity of the issues and parties thereto with those in the present action. *There was thus presented to the court for determination the precise question involved in this motion, and, if this issue had been tried and found against the plaintiff, the judgment of the court would have been that the action should abate; and the rights of the parties would have been determined by the judgment in the former action. Instead of taking this course, the*

appellants asked the court, and the court, at their instance, struck this defense from the answer of Priest, and the cause was tried upon the same issues as were presented in the former action, without any objection to a re-examination of them by the court. It is too clear for argument that the appellants cannot after an adverse judgment upon the issues of their own framing interpose a defense to the enforcement of that judgment, which they had an opportunity to present for the purpose of defeating the respondents' claim, but which they industriously sought not to have presented to the court for its judgment thereon.

"When this cause was here upon the former appeal, the appellants urged reversal of the judgment because of the prior judgment in the case of *Priest* v. *Brown* which they had pleaded as a bar to any further litigation in the issue then determined. . . . . In *Harris* v. *Barnhart*, 97 Cal., 546, it was said: 'When a judgment is ineffectual as evidence in a plea of former adjudication until the time for an appeal therefrom has expired, the true course of a defendant in such a case would be to plead the pendency of the former action in abatement, until the judgment therein became final, when a supplemental answer averring the proper facts in bar of the action would be in order.'

"The appellants, Campbell and Kent, urge that, as they are mere stakeholders, they are liable to suffer by reason of the different judgments in the two causes. If, however, they had retained their position as stakeholders, and had complied with the offer made in their original answer to the complaint of the plaintiff by paying the money into court, they would then have been entitled to a judgment discharging them from further liability therefor, but, after Priest has been brought into the action at their instance, they abandoned their position as stakeholders, and defended against

> his right to receive any of the money. Having thus assumed a position antagonistic to Priest, they cannot claim any of the consideration due a stakeholder, but are in the position of any other litigant who failed to sustain his defense."

The analogy between the case of *Brown* v. *Campbell* and the suit at bar need not be commented upon at length. It is, however, interesting to observe that the same trustees and their successors are the same stakeholders here as they were in that case, and that Mr. Blakeman, who here appears on behalf of Teresa Bell as administratrix etc., against the application of the principle above stated, was the attorney for the respondent in support of the principle enunciated there.

The U. S. Oil & Land Company, complainant here, was a defendant to the cross-complaints of both Teresa Bell as administratrix etc., and of the San Francisco Savings Union and its trustee in the action of *Bell* v. *San Francisco Savings Union,* and these parties by the force of the rule laid down in *Brown* v. *Campbell, supra,* are bound by the judgment in the case of *Bell et al.,* v. *San Francisco Savings Union et al.* in all matters affecting the status of the parties and the title of the 10,067.2 acre tract.

Finally, since the court had jurisdiction of the subject-matter and all the parties in *Bell* v. *San Francisco Savings Union et al.* and any and all objections of the parties were waived as to jurisdictional questions, the decree in that action is binding and conclusive upon all the parties and as to all the facts, matters and issues contained in the pleadings or included in the findings.

Rodgers v. *Pitt et al.,* 96 Fed. 668, 676-677.

POINT 8.

NEITHER THE JUDGMENT IN *Bell* v. *San Francisco Savings Union,* ACTION No. 4424, NOR THE TRUSTS CREATED BY THE DEED FROM STAACKE TO CAMPBELL AND KENT, HAS BEEN EXECUTED.

The defendant Teresa Bell as administratrix etc., by paying the said claim proved and allowed against the estate of Thomas Bell deceased, the same being the debt secured to the San Francisco Savings Union by the deed of trust, in her representative capacity, instead of allowing the sale of 10,067.2 acre tract to be made under the provisions of the deed of trust and the judgment in *Bell* v. *San Francisco Savings Union* directing the proper execution thereof, by sale, *discharged the same,* and the conveyance of the 10,067.2 acre tract to her in her representative capacity by the trustees of the San Francisco Savings Union, instead of to "Staacke, his heirs or assigns" in their representative capacity of trustees of the trust created by the deeds of Grover and Rosener, *made her an involuntary trustee of the 10,067.2 acre tract for the grantees of John S. Bell.* By the discharge of the debt to the San Francisco Savings Union by one of the parties primarily liable therefor, the title to the 10,067.2 acre tract upon conveyance by the trustee was necessarily held upon the same trusts that existed in Staacke before the note and deed of trust in favor of the San Francisco Savings Union and its trustees were executed and delivered by Staacke and Thomas Bell. (*Savings and Loan Society* v. *Burnett,* 106 Cal. 514, 528).

> "Every one to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration."
>
> Civil Code of California, section 2243;
> *Cavagnaro* v. *Don,* 63 Cal. 227, 231;
> *Moultrie* v. *Wright,* 154 Cal. 520-526;
> *Thompson* v. *Bank of California,* 4 Cal. App. 660;
> *Chamberlin* v. *Chamberlin,* 7 Cal. App. 634.

. . Justice Ross, in rendering the decision in *Cavagnaro* v. *Don,* supra, quoted with approval from Perry on Trusts, section 217: "It is an *universal* rule that if a man purchases property of a trustee with notice of the trust, he shall be charged with the same trust in respect to the property as the trustee from whom he purchased. And even if he pays a valuable consideration, with notice of the equitable rights of a third person, he shall hold the property *subject to the equitable interests of such person.*"

In California a deed of trust has no feature in common with a mortgage except that is is executed to secure an indebtedness, and a suit for a foreclosure and sale will not lie, as the contract of the parties is that, upon default, the trustee shall sell according to the directions of the trust.

Kock v. *Briggs,* 14 Cal. 257-263;
Fuquay v. *Stickney,* 41 Cal. 583-587;
Whitman v. *San Francisco Savings Union,* 50 Cal. 145-150;
Grant v. *Burr,* 54 Cal. 298-301;
Bateman v. *Burr,* 57 Cal. 480-483;
Savings & Loan Society v. *Deering,* 66 Cal. 281-286;
Partridge v. *Shepard,* 71 Cal. 470-478;
Moore v. *Calkins,* 95 Cal. 435-437;
Savings & Loan Society v. *Burnett,* 106 Cal. 514-528;
Herbert Kraft Co. v. *Bryan,* 140 Cal. 73-80;
Weber v. *McCleverty,* 149 Cal. 322;
Travelli v. *Bowman,* 150 Cal. 587;

So strongly engrafted upon the law of California is the idea that a debt secured by any deed of trust must be made good or enforced by the act of the parties themselves in executing the provisions of the deed, that in *Herbert Kraft Co.* v. *Bryan, supra,* the court entertained a grave doubt whether, in analogy to the construction which it has placed on section 726 of the Code of Civil Procedure providing that there can be but

one action for a debt secured by mortgage, an action will lie on a debt secured by deed of trust before sale, saying:

> "Assuming that a deed of trust is not within that section, still there are other considerations to be weighed in determining whether a creditor who has accepted such a deed as security has not contracted to pursue the terms of the deed when he attempts to forcibly collect the debt."

In *Weber* v. *McCleverty, supra,* the court held that no *presentation* of the debt secured by a deed of trust as a claim against the estate of a deceased trustor is necessary as a prerequisite to the execution of the power of sale conferred by the deed, and that a sale under the deed cuts off a homestead right created subsequent to the deed in point of time. In reaching these results the court had occasion to criticize the language used in *Sacramento Bank* v. *Alcom,* 121 Cal. 379; *Tyler* v. *Currier,* 147 Cal. 36; and *Hodgkins* v. *Wright,* 127 Cal. 688, wherein such expressions concerning deeds of trust as that "In effect, they are mortgages with power of sale," and the court said:

> "The statement that they are *in effect,* or practically, mortgages with power to sell, means only that the practical result of the enforcement of either is the same: that is, the estate held by the mortgagor at the time of the execution of the mortgage in one case, and that of the trustor at the time of the execution of the deed of trust, in the other case, are by the respective conveyances of the sheriff on foreclosure sale, and of the trustee on the trustee's sale, transferred to the respective purchasers at such sales and that in the meantime the mortgagor and the trustor have the use and enjoyment of the property."

The decision of the court upon this point was given in the following words:

> "In *legal* effect, a deed of trust does *not* create a lien or incumbrance on the land, *but conveys the*

> *legal title to the trustee.* In order to execute the trust he must be by the deed so far invested with the absolute title of the land as is necessary to enable him to convey it to the purchaser at the trustee's sale free of all right, title, interest or estate of the trustor, or of any one claiming under or through the trustor by virtue of any transaction occuring after the making of the trust deed. The deed of trust, therefore, vests in the trustee, for the purposes of the trust, *the absolute legal title to the entire estate held by the trustor immediately prior to its execution,* and that estate must remain in the trustee for that purpose until the trust is either executed or ceases to exist by reason of payment of the debt." (Italics are ours.)

But were this not the law of California, and instead thereof it was provided that a deed of trust was required to be foreclosed in an action similar in form and resulting in the same kind of a judgment with directions for a sale as that entered in *Bell* v. *San Francisco Savings Union,* still the transaction and deed by which the defendant Teresa Bell as administratrix etc., claims title to the 10,067.2 acre tract was and is absolutely *void as against and in contravention of the express terms of the decree;* for not only was the payment made as a payment of the claim presented and allowed against the estate of Thomas Bell on said Thomas Bell's guarantee of the $60,000 note and of the payment thereof but the conveyance by the trustees of the Savings Union to said Teresa Bell as such administratrix in consideration thereof, was *not* in compliance with the sale ordered by the judgment in that case; and, if it had been such a sale *it has never been confirmed as required by said judgment.* It was also contrary to and in violation of the provisions of said decree requiring the sale to be made at public auction after publication of notice thereof in certain newspapers designated therein, and deprived the complainant of material rights secured to it by such provisions of the decree, and of the

opportunity to protect its rights, title and interest by bidding at such public auction and buying the property.

> It is FATAL ERROR in a decree ordering a sale of real estate without directing that the sale shall first be notified to and confirmed by the court as provided in the statute under which the sale was made.
>
> *Bank of United States* v. *Ritchie,* 8 Pet. 128
>
> A sale made and conveyance by a trustee when he has exceeded his power *in conveying the land in violation of the decree,* is void.
>
> *Bank of United States* v. *Ritchie,* 8 Pet. 128;
>
> Where sale of trust property is subject to confirmation or rejection by the court, title will not pass unless sale is confirmed by the court.
>
> *Kenaday* v. *Edwards,* 134 U. S. 117, *125.*

At the hearing below of the special defense, counsel for the defendants Hammon and Van Deinse, in attempting to support the validity of the pretended judgment and order of sale in *Bell* v. *Staacke,* and the pretended sale to the defendant Teresa Bell as administratrix etc., through whom they claim title to 2100 acres of the 10.067.2 acre tract, urged upon the consideration of the court a line of authorities in California which seem to support the doctrine that a trustor's interest in real property conveyed by deed of trust to secure an indebtedness *may be sold and conveyed* by voluntary conveyance, or that it may be encumbered, and that because this is so they contended the court had jurisdiction in *Bell* v. *Staacke,* of the equitable title of John S. Bell and his grantees in the 10,067.2 acre tract and that it was this interest that passed to Teresa Bell administratrix under the commissioner's deed following that pretended sale. In this, however, they lose sight of the fact that those cases merely hold that such an estate in the trustor *is alienable,* and if alien ated or encumbered as such the *contract* of the parties is valid and enforceable. Counsel also lose sight of the fact that neither John S. Bell nor his grantees ever

entered into any contract with Staacke, through whom the defendant Teresa Bell claims, with reference to their equitable estate in the 10,067.2 acre tract; but that, on the other hand, the pretended claim of a lien upon said 10,067.2 acre tract conveyed by Grover and Rosener in trust to Staacke was against both the legal and equitable titles and it was both of these titles—the land itself which were ordered sold by said purported judgment and both of which John S. Bell and his grantees had a right to expect to have sold to realize the full value of the security. *This is what made the San Francisco Savings Union and its trustees indispensable parties to the action of Bell* v. *Staacke,* but they were not made parties to said action, and the land could not therefore be so sold in said action.

Finally, we respectfully submit, in any view of the facts of this case, Teresa Bell as administratrix etc. is an involuntary trustee for the appellant herein of an undivided half interest in and to the 10,067.2 acre tract under the terms and provisions of the trust created in Staacke by the deed of March 7 1887 from Grover and Rosener; that this trust is revived in her with equal effect whether the said purported decree and order of sale in *Bell* v. *Staacke,* is valid and she obtained all the interest, both legal and equitable, which Staacke as trustor had in the 10,067.2 acre tract when he conveyed to Campbell and Kent, or whether that sale be considered void (as we claim and assert) and it is held that she paid the claim due the San Francisco Savings Union in her representative capactiy as administratrix with the will annexed of the estate of Thomas Bell, deceased, as the voluntary act of one jointly liable to pay a secured debt or paid it under an order of the court in the matter of said estate. In either case she occupies toward the land in question the position of one who with notice of the trust and as the successor in interest of the trust property has again received the title thereto after it has once passed into the hands of a bona fide purchaser. Section 2243 of the Civil Code of California and the cases cited inter-

preting its application are but declaratory of a rule in equity as old as the law of trusts, viz: that after the title to trust property has passed to purchasers for value and without notice of the trust and has been discharged from the conditions thereof, upon a reconveyance of the property to the original trustee or to parties having notice of the original trust the rights and titles of all parties thereto are revived and may be enforced under the trust originally created. If a person holding land in trust conveys it by an absolute deed to another, who takes it without notice of the trust, and it afterwards passes through several owners to the first holder, he will hold it in trust as before.

Church v. *Church,* 25 Pa. (1 Casey), 278;

Church v. *Roland,* 64 Pa. (14 P. F. Smith), 432.

On the *14th day of February, 1908,* the judgment in said suit of *Bell et al.,* v. *San Francisco Savings Union et al.,* was affirmed upon separate appeals taken therefrom by Teresa Bell as such administratrix and by the U. S. Oil & Land Company and James L. Crittenden (Tr. p. 81) (Admitted by Hammon and Van Deinse, Tr. p. 272; not denied by other defendants.)

The 10,067.2 acre tract has greatly increased in value by reason of the discovery of oil therein and in the adjoining land and is now of the value of at least $2.999,999.00 (Tr. pp. 81-82). (Admitted by all defendants; Hammon and Van Deinse merely deny that it is worth $3,000.000.00 Tr. p. 273.)

On *June 15th, 1908,* said Teresa Bell as such administratrix paid to the San Francisco Savings Union $179,411.40, the full amount due it on its claim proved and allowed against the estate of Thomas Bell, deceased in charge, settlement and satisfaction thereof, and on the same day the said Mercantile Trust Company of San Francisco and said San Francisco Savings Union made and executed an instrument in writing purporting and pretending to grant, bargain, sell and convey said 10.067.2 acres of land to said Teresa Bell as administratrix of the estate of Thomas Bell, deceased, which said

instrument was dated *May 26th, 1908,* and recorded at the request of said Teresa Bell as such administratrix on the *15th, day of June, 1908,* in Book of Deeds No. 118 of the Records of Santa Barbara County; and on *June 16th, 1908,* said Teresa Bell as such administratrix and said San Francisco Savings Union, Edward B. Pond, Thaddeus B. Kent and Mercantile Trust Company of San Francisco made and filed by their attorneys in said action of *Kate M. Bell et al.,* v. *San Francisco Savings Union et al.,* No. 4424, in the Superior Court of Santa Barbara County a written instrument or stipulation stating and declaring "That the total amount due to said San Francisco Savings Union was $179,411.40 and that said amount had been paid to said San Francisco Savings Union by Teresa Bell as such administratrix *without any sale of the lands in said judgment described,* and that it was, therefore, stipulated that the said judgment in said action No. 4424*be and was satisfied, and that the Clerk of the said Superior Court was directed to enter satisfaction of said judgment.*" The said pretended sale and transfer of June 15th, 1908, was made secretly without any notice whatever thereof or of any proposed sale being given or published in any news paper, and without any notice whatever being given to said U. S. Oil & Land Company. The said Teresa Bell, Mercantile Trust Company and San Francisco Savings Union knew at the time of said pretended sale and transfer on June 15th, 1908, that said 10,067.2 acres of land was worth and of the value of at least $500.00 and that the development of oil near or adjoining said land made it prospectively worth $1,000,000.00 or more, and said pretended sale and transfer was a fraud upon the appellant and contrary to and in violation of the decree in said action No. 4424, and said Teresa Bell as such administratrix claims and asserts that said pretended deed and conveyance date May 26th, 1908, transferred and vested in her as such administratrix the title of, in and to said tract of land consisting of 10,067.2 acres and all rights, title and interest of said

U. S. Oil & Land Company, the appellant herein, and and that said claim is without merit and wrongful and unlawful and contrary to and in conflict with said judgment in said action No. 4424 and was a fraud upon the appellant and was and is made with the wrongful, fraudulent and unlawful intents, purposes and designs alleged and with intent to defraud said U. S. Oil & Land Company out of its interest in and title to said land. The said 10,067.2 acres of land has never been advertised for sale by said Mercantile Trust Company of San Francisco as required in and by said decree, and said pretended deed and conveyance dated May 26th, 1908, and said pretended transfer of said tract of 10,067.2 acres to said Teresa Bell as such administratrix by said Mercantile Trust Company and San Francisco Savings Union *have never been reported or submitted to or approved or confirmed by said Superior Court of Santa Barbara County* (Tr. pp. 82-87). The facts in this paragraph stated are substantially admitted by all of the defendants (Tr. pp. 119-124, 273-277, 150-155, 168-170), the only denials being as to the alleged fraud, fradulent intents and wrongful and unlawful nature or character of said transactions. Hammon and Van Deinse directly admit the transactions as alleged, denying only fraud, fraudlent intents and that said acts were wrongful or unlawful and that the transfer and conveyance was a pretended one; the other defendants, except the Associated Oil Company allege under oath that said $179,411.40 "was paid by said Teresa Bell as such administratrix from the moneys and funds of said estate in accordance with the said judgment and order of said Superior Court in and for the City and County of San Francisco," also that it was paid "in discharge and settlement of the amount due said San Francisco Savings Union on its said secured claim proved and allowed against said estate," and also that "the said San Francisco Savings Union, upon its receipt of the said sum of $179,411.40, made, executed and delivered to said Teresa Bell as such administratrix a deed of *RE-CONVEYANCE OF ALL THE LAND EMBRACED IN ITS SAID MORTGAGE*

TO-WIT, THE 4000 ACRE TRACT AND THE SAID TRACT OF 10,067.2 ACRES'' (Tr. pp. 119-120, 150-152). Said defendants also state and allege the payment of said $179,411.40 was made under an order and judgment of said Superior Court of the City and County of San Francisco in the matter of the said estate of Thomas Bell (Tr. 119-120, 150).

The denial by Teresa Bell and by all of the other defendants except Hammon, Van Deinse, the Associated Oil Company, Kate M. Bell and John S. Bell (Tr. 123, 154) ''that the said Teresa Bell, the Mercantile Trust Company and the San Francisco Savings Union knew, or that each or any of them knew, at the time of the said transfer and of the payment of the said sum of $179,411.40 that the said tract of land of 10,067.2 acres was worth and of the value of at least $500,000, *or of any greater value than* $100,000, or that they knew that the development of oil near or adjoining said lands made them prospectively worth $1,000,000 or more'' shows and proves conclusively that the reconveyance of the 4,000 acre tract was the real and material consideration for the payment of said $179,411.40, and this would have appeared beyond any doubt on a trial upon the merits, for it would have been proven by incontrovertible evidence and testimony that said administratrix had already sold or made a contract to sell said 4,000 acres for about $450,000, and that after or before said reconveyance said 4,000 acres of land was sold for that amount and the money paid, and that a part of the very money received for said 4,000 acres was used in making said payment of $179,411.40 to the San Francisco Savings Union. This was an ingenious arangement or device by means of which Teresa Bell as such administratrix sought to obtain the 10,067.2 acre tract without paying any consideration therefor, though the same would have sold for at least $1,000,000.00 and probably for much more at the rate said administratrix sold the 4,000 acre tract. It would have also been shown on a trial of the merits of this suit that said Hammon and Van Deinse contracted

to pay at the rate of more than $500 an acre for the 2,100 acres claimed to have been purchased by them from the said administratrix and heirs of Thomas Bell. Had the 10,067.2 acre tract been sold at the rate received by said administratrix for the 4,000 acres, the indebtedness to the San Francisco Savings Union would have been paid and at least $800,000 paid over by the Mercantile Trust Company under the decree in said suit of *Bell* v. *San Francisco Savings Union* to George Staacke, his heirs assigns and would have passed to the appellant as the successor of John S. Bell, the original benficiary of the trust upon which said 10,067.2 acres were conveyed to Staacke by Grover and Rosener. If the 10,067.2 tract had been sold at the rate paid per acre by Hammon and Van Deinse, SOME MILLIONS OF DOLLARS would have gone to the appellant when paid over to Staacke or his heirs under said decree. It must be apparent, therefore, that the said transaction and deed by which said Mercantile Trust Company and the San Francisco Savings Union attempted to transfer to said Teresa Bell as such administratrix the said 10,067.2 acres of land was in the highest degree injurious and damaging to the U. S. Oil & Land Company, appellant herein, and in every sense wrongful and unlawful because it deprived the U. S. Oil & Land Company of rights secured to it by said decree; and it in no respect or way complied with or conformed to the decree. The decree being valid and binding upon all parties to the suit it could not be disregarded or departed from without the consent of all parties, and the court itself could not change it after its affirmance on appeal without such consent. The conclusions of law upon which said decree was made (Tr. p. 73) declared positively and unequivocally that "said defendant Teresa Bell as administratrix of the estate of Thomas Bell, deceased, with the will annexed *is entitled to no other judgment herein*" than "*that so much of said piece or parcel of land described in said grant in trust as does not include said second above described of said two several pieces of land* be

first sold by said defendants Mercantile Trust Company of San Francisco in the execution of said trusts to the end that to the extent of the proceeds thereof the amount of said promissory note and interest (the $60,000 note to the San Francisco Savings Union) may be paid out of said proceeds," that is, that the 10,067.2 acres be sold first. The Court had found in Finding 39 (Tr. p. 71) that there was no such understanding or ogreement that said 10,067.2 acre should be sold first. The said judgment (Tr. p. 74) states that it is "Adjudged that the above-named plaintiffs Kate M. Bell and James L. Crittenden and the above-named defendant to cross-complaint U. S. Oil & Land Company jointly and severally take nothing by this action *and that the above-named defendant Teresa Bell as administratriz of the estate of Thomas Bell, deceased, with the will annexed take nothing by this action except as hereinafter adjudged,* and nowhere adjudges anything in favor of said Teresa Bell as such administratrix unless the direction to sell the 10,067.2 acres first be construed to have been in her favor and for her benefit. The decree that the Mercantile Trust Company pay "*the balance* of said proceeds, if any, (from the sale of both tracts) to said defendant George Staacke, his heirs or assigns" (Tr. p. 80) was not an adjudication in her favor. The decree obviously left the execution of the original trust to Staacke after the receipt of such proceeds by him from the sale of said pieces of property, for it found (Tr. pp. 54-56) the trust upon which said tracts were conveyed by Grover and Rosener to Staacke.

The adjudication that Kate M. Bell, James L. Crittenden and U. S. Oil & Land Company" take nothing by this action" merely meant that the Court would not grant them any of the relief against the San Francisco Savings Union and the Mercantile Trust Company prayed for by them. It is the form usually employed where parties are denied the relief sought by their pleadings.

On the 5th day of April 1905, George Staacke died testate and thereafter George Henry Howard was duly appointed and qualified as executor of his estate on the 19th day of April 1907 (Tr. pp. 36-37). Thereafter said George Henry Howard executed to the defendant O. H. Harshburger a deed and conveyance purporting to transfer and convey all the right, title and interest of said George Henry Howard in and to said tract of 10,067.2 acres with notice and knowledge of facts alleged in the bill showing the rights, title and interest of appellant herein (Tr. pp. 89-90) (Not denied by any of the defendants). The bill avers that said deed made by said Howard to said Harshbarger was made with certain unlawful and fraudulent intents (Tr. p. 90) which averment as to unlawful an dfraudulent intents is denied by the answer.

The bill further alleges that the matter in controversy, exceeds exclusive of costs, $10,000; that the property involved exceeds in value $1,000,000; that the matter in controversy in this suit is between the complainant, a citizen of Arizona, and the defendants, citizens of California; that each and all of the defendants had notice of said judgments, decrees and findings and of the right, title and interest of complainant in and to an undivided one-half of said tract of 10,067.2 acres before they or any of them entered upon the same or paid any money or consideration for any right or interest therein or thereto; that said Hammon and Van Deinse in June, 1911, wrongfully and unlawfully entered upon a portion of said land with certain wrongful and unlawful intents stated and threatened to extract and appropriate large quantities of oil therefrom; that said Teresa Bell as such administratrix has collected large sums of money as rents from said land, etc.; that on or about May 20th, 1908, said Teresa Bell, Mercantile Trust Company of San Francisco and San Francisco Savings Union combined and conspired together to evade and defeat said decree in said action No. 4,424 and to deprive complainant of its right, title and interest in and to an undivided one-half of said

10,067.2 acres and of its interest in and right to the proceeds that might be obtained by and from a sale thereof under said decree, and did, in pursuance and execution of said conspiracy, cause said deed of May 26th, 1908, to be made, executed and recorded as alleged in the bill; that defendant C. A. Hunt is the County Clerk of said County of Santa Barbara and the Clerk of said Superior Court of said Santa Barbara County and has in his possession and under his control the deed and conveyance made and executed by said George Staacke to Catherine M. Bell and James L. Crittenden and delivered to said Hunt on the 8th day of July, 1901, as alleged in the bill (Tr. pp. 90-92). The matters stated in this paragraph are either admitted or not denied, except in so far as they charge fraud, combination, or conspiracy or that the acts were wrongful or unlawful or done with fraudulent intent, object, purpose or design.

The facts hereinabove in this brief stated appear and are clearly and fully averred and alleged in the bill and the District Judge, as we have stated above, did not seem to know or to understand what was alleged in the bill or the force or effect of the facts stated in it. His decision being upon the whole bill and not upon the special matter or issue heard under his order, we have been compelled to set forth fully and at such great length the facts and matters alleged in the bill so that the real merits of the bill might fully appear to this Court on the appeal.

Appellant respectfully submits that the decree should be reversed and the cause remitted to the court below for trial upon the merits, and that appellant is entitled to recover its costs on this appeal.

RICHARDS & CARRIER,
and
JAMES L. CRITTENDEN,
Solicitors for Appellant.

JACOB M. BLAKE
Of Counsel.
Dated: September 26th, 1914.